

ECCLESIASTICAL

L A W.

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In TWO VOLUMES.

V O L. II.

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W A L



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THE TWO VOLUMES

VOL. I

THE TWO VOLUMES

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Marriage.

CONCERNING marrying again, the former husband or wife being living; See Tit. **Polygamy.**

Concerning a man marrying a second wife, the former wife being dead; or marrying a widow: See Tit. **Bigamy.**

Having first premised, that the statute of the 26 G. 2. *ch.* 33. which will often occur in the following sections doth not extend to the marriage of the royal family; nor to Scotland; nor to any marriages amongst people called quakers, or amongst persons professing the jewish religion, where both the parties are quakers or jews respectively; nor to any marriages beyond the seas. *f.* 17, 18. I will treat of the matters contained under this title in the following order:

- I. *Who may marry.*
- II. *Of marriage contracts.*
- III. *Of banns.*
- IV. *Of licence.*
- V. *When and where to be solemnized; and therein of clandestine marriages.*
- VI. *Form of solemnization.*
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- VIII. *Register of marriage.*
- IX. *Certificate of marriage.*
- X. *Trial of marriage.*
- XI. *Divorce.*
- XII. *Alimony.*
- XIII. *Elopement.*

I. *Who may marry.*

1. **E**DM. *Where there is not the consent of both parties, it is no marriage, Age. Therefore they who give girls unto boys in their infancy, do nothing; unless both parties shall consent, after they come to the age of discretion.*

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Therefore we do prohibit, that from henceforth no persons shall be joined together, where both or either of the parties shall not have arrived to the age appointed by the laws and canons: unless such conjunction shall be dispensed withal, in cases of necessity, for the publick welfare. Lind. 272.

Where there is not &c.] This constitution is taken out of the decretals, and was from thence transferred into the body of the english laws, in the council at Westminster, in the year 1175. *Gibf.* 415.

Girls unto boys in their infancy] That is under the age of seven years. *Lindw.* 272.

Do nothing] That is, as to the bond of matrimony; nor even as to espousals, unless after the seventh year it shall appear, either by word or deed, that they continue in the same mind: for then, from such willingness or consent, espousals do begin between them. For if after the seventh year compleat, both parties do continue in the same mind, this is sufficient as to espousals. *Lindw.* 272.

Unless both parties shall consent after they come to years of discretion] The time of agreement or disagreement, when they marry within the marriageable years, is for the woman at twelve or after, and for the man at fourteen or after; and there needs no new marriage, if they then agree. But disagree they cannot before the said ages; and then they may disagree, and marry again to others without any divorce: and if they once after give consent, they can never disagree afterwards. If a man of the age of fourteen marry a woman of the age of ten, at her age of twelve he may as well disagree as she may, tho' he were of age of consent; because in contracts of matrimony, either both must be bound, or equal election of disagreement given to both: and so on the contrary, if the woman be of the age of consent, and the man under. *1 Inst.* 79.

Age determined by the laws and canons] Which, as to espousals (as hath been said), is the age of seven years, when infancy endeth, both in the one party and in the other; and which, as to finishing the contract, is the age of twelve in the woman, and of fourteen in the man. *Lindw.* 272.

By the laws of this realm, if a woman during her minority be married to a man seized of lands or tenements in fee simple or fee tail, by purchase or descent, she shall be endowed of the third part of such lands and tenements, so that she have accomplished the age of *nine* years at her husband's death. *Swinb. Matr. Con.* f. 7.

In cases of necessity] Of which necessity the diocesan, without whose licence they ought not to contract matrimony, shall be the judge. *Lindw.* 272.

For the publick welfare] As where two princes conclude a peace, and for the more assured confirmation thereof, match their children in marriage: This marriage the laws do tolerate as lawful, being made upon such urgent cause, altho' otherwise for divers wants the same were unlawful. *Swinb.* f. 7.

And

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And by the 26 G. 2. c. 33. which layeth sundry restraints upon marriages, the marriages (as hath been said) of the royal family are excepted. f. 17.

2. Marriages that are made contrary to the consent of parents, are pronounced to be invalid both by the canon and civil law; and the church did sometimes anathematize such as married without the consent of parents. But yet when sons and daughters arrive at a competent age, and are endowed with the use of strong reason, they may of themselves contract marriage without this consent: for it is reasonable that children should be left at liberty in nothing more than in marriage, because their future happiness in this life depends upon it. By the civil law indeed, an emancipated son might have contracted marriage without his father's consent: But a son under the power of his father, could not do it without his father's approbation. And as children owe a reverential obedience to their parents, sons at this day under twenty five years of age, and daughters under twenty, are, in Holland and other countries governed by the civil law, forbidden to marry without their parents consent. But if they exceed the said respective ages, the bare dissent of parents, without a sufficient cause, is not a legal impediment to hinder them from contracting marriage. *Ayl. Par. 362.*

But by the law of England, full age is when a person, either male or female, hath attained to the age of twenty one years compleat. And accordingly, by the 26 G. 2. c. 33. it is enacted as follows; viz. *All marriages solemnized by licence, where either of the parties, not being a widower or widow, shall be under the age of twenty one years, which shall be had without the consent of the father of such of the parties so under age (if then living) first had and obtained; or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and if there shall be no such guardian, then of the mother, if living and unmarried; or if there be no mother living and unmarried, then of a guardian or guardians of the person appointed by the court of chancery—shall be void.* f. 11.

But whereas it may happen that the guardian or mother of any such party to be married, being so under age as aforesaid, may be non compos mentis, or may be in parts beyond the seas, or may be induced unreasonably and by undue motives to abuse the trust reposed in them by refusing their consent to a proper marriage; it is therefore enacted, that in case any such guardian or mother, whose consent is made necessary as aforesaid, shall be non compos mentis, or beyond sea, or withhold his or her consent to the marriage of any person, such person desirous to marry may apply by petition to the lord chancellor, who may proceed upon such petition in a summary way; and if the marriage proposed shall on examination appear to be proper, he shall judicially declare the same to be so, by an order of court; and such order shall be as effectual, as if such guardian or mother had consented. f. 12.

And by Can. 62. No minister, upon pain of suspension for three years ipso facto, shall celebrate matrimony between any persons when banns are thrice asked, and no licence in that respect necessary; before the parents or governors of the parties to be married, being under the age of twenty

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and one years, shall either personally, or by sufficient testimony, signify to him their consents given to the said marriage.

Pursuant to which canon, about the year 1725, Mr. Bridges, curate of Shoreditch, London, having married a couple by banns published in that church, and they appearing not to be of age, was articled against before the chancellor of London (Dr Henchman), and had sentence against him as being guilty of a breach of the canon. Mr Bridges being a man of character, and it appearing that he was imposed upon; the chancellor and bishop of London were willing to have mitigated the penalty. But upon a consultation at doctors commons, it was agreed, that the canon having fixed a penalty, without leaving any power in the judge to mitigate it; he could only be pronounced guilty of a breach of the canon, and must undergo the penalty of it. Mr Bridges appealed to the arches; where, after deliberation, the sentence was confirmed. Then he petitioned the archbishop of Canterbury for a dispensation of the canon: But it was agreed by all the civilians, that as the father of the young man had been at the expence of prosecuting, and Mr Bridges was convicted of a breach of the canon, he had a right to have lawful punishment thereby directed to be inflicted. And Mr Bridges could have no relief. But if there had only been a necessary promoter, or an ex officio process; they were of opinion it might be taken off discretionally, as no person could be injured by it.

And the late archdeacon Sharpe, in his visitation charges, is of opinion, that it is the minister's duty to be himself assured of the age or consent of the parents of the parties, before he marries any couple even by banns; otherwise he will be guilty of a breach of the canon. *p. 291.*

But now by the statute of the 26 G. 2. c. 33. No minister solemnizing marriages between persons, both or one of whom shall be under the age of twenty one years, after banns published, shall be punishable by ecclesiastical censures, for solemnizing such marriages without consent of parents or guardians whose consent is required by law, unless he shall have notice of the dissent of such parents or guardians. And in case the parents or guardians, or one of them, of either of the parties who shall be under the age of twenty one years, shall openly and publicly declare or cause to be declared in the church or chapel where the banns shall be so published, at the time of such publication, his dissent to such marriage; such publication of banns shall be void. *f. 3.*

Levitical degrees.

3. by the 25 H. 8. c. 22. (which Dr. Gibson says is repealed by the 28 H. 8. c. 7. *f. 3.* and by the 1 Mar. sess. 2. c. 1. and which Mr Cay takes notice of as repealed, but which Mr. Hawkins inserts in his edition of the statutes, as being in force and unrepealed) it is enacted as follows: *Since many inconveniences have fallen by reason of marrying within the degrees of marriage prohibited by god's laws, that is to say, the son to marry the mother or the stepmother, the brother the sister, the father his son's daughter or his daughter's daughter, or the son to marry the daughter of his father procreate and born by his stepmother, or the son to marry his aunt being his father's or mother's sister, or to marry his uncle's wife, or the father to marry*

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marry his son's wife, or the brother to marry his brother's wife, or any man to marry his wife's daughter or his wife's son's daughter or his wife's daughter's daughter or his wife's sister; which marriages, albeit they be prohibited by the laws of god, yet nevertheless at some times they have proceeded under colour of dispensation by man's power: it is enacted, that no person shall from henceforth marry within the said degrees. f. 3, 4.

Provided, that this article concerning prohibitions of marriages within the degrees aforementioned, shall always be taken and interpreted of such marriages, where marriages were solemnized, and carnal knowledge was had. f. 14.

And by the 28 H. 8. c. 7. (which is not in Mr Hawkins's nor in Mr Cay's collection, and which Dr Gibson thinketh to be repealed; but which Vaughan and Ventris, in the case of Harrison and Burwell hereafter following, do suppose and argue to be unrepealed) it is in like manner enacted thus: Since many inconveniences have fallen, by reason of the marrying within the degrees of marriage prohibited by god's law, that is to say, the son to marry the mother, or the stepmother carnally known by his father; the brother the sister; the father his son's daughter, or his daughter's daughter; or the son to marry the daughter of his father, procreate and born by his stepmother; or the son to marry his aunt, being his father's or mother's sister; or to marry his uncle's wife, carnally known by his uncle; or the father to marry his son's wife, carnally known by his son; or the brother to marry his brother's wife, carnally known by his brother; or any man married, and carnally knowing his wife, to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister: f. 9.

And further to declare the meaning of these prohibitions, it is to be understood, that if it chance any man to know carnally any woman, that then all and singular persons, being in any degree of consanguinity or affinity, as is above written, to any of the parties so carnally offending, shall be deemed to be within the cases and limits of the said prohibitions of marriage: All which marriages, albeit they be prohibited by the laws of god, yet sometimes have proceeded under colour of dispensations by man's power; it is enacted, that from henceforth no person shall marry within the degrees afore rehearsed. f. 10, 11.

And by the 32 H. 8. c. 38. (which was repealed in part by the 2 & 3 Ed. 6. c. 23. and was repealed in the whole by the 1 & 2 P. & M. c. 8. f. 19. but was again revived in part by the 1 El. c. 1. f. 11, 12. and so left as it stood upon the 2 & 3 Ed. 6. c. 23. as hereafter followeth) All such marriages as shall be contracted between lawful persons (as by this act we declare all persons to be lawful, that be not prohibited by god's law to marry), such marriages being contract and solemnized in the face of the church, and consummate with bodily knowledge, or fruit of children or child being had therein, between the parties so married, shall be deemed lawful just and indissoluble; notwithstanding any precontract not consummate with bodily knowledge, which either of the parties so married or both shall have made, with any other person, before the time of contracting that marriage which is solemnized and consummate, or whereof such fruit is ensued or may ensue as aforesaid; and notwithstanding any dispensation, prescription, law, or other thing

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thing granted or confirmed by act, or otherwise; and no reservation, or prohibition, god's law except, shall trouble or impeach any marriage without the levitical degrees; and no person shall be admitted in the spiritual court to any process, plea, or allegation to the contrary.

And by the 2 & 3 Ed. 6. c. 23. before mentioned, it is thus enacted: As concerning precontracts, the said statute of the 32 H. 8. c. 38. shall be repealed, and be of no force or effect, and be reduced to the estate and order of the king's ecclesiastical laws of this realm; so that when any cause or contract of marriage is pretended to have been made, it shall be lawful to the king's ecclesiastical judge of that place, to hear and examine the said cause; and (having the said contract sufficiently and lawfully proved before him) to give sentence for matrimony, commanding solemnization, cohabitation, consummation, and traflation as becometh man and wife to have, with inflicting all such pains upon the disobedients and disturbers thereof, as before the said statute he might have done. s. 2.

Provided, that this act do not extend to make good any of the other causes, to the dissolution or disannulling of matrimony, which be in the said act spoken of and disannulled; but that in all other causes and other things therein mentioned, the said act do stand in force. s. 4.

The degrees specified in these statutes, are particularly set forth in the eighteenth chapter of Leviticus; whereby not only degrees of kindred and consanguinity, but degrees of affinity and alliance do hinder matrimony. Which lord Coke illustrateth in this manner:

Of the man's part.

Degrees of kindred and consanguinity prohibited.

A man may not marry his

Mother.
Father's sister.
Mother's sister.
Sister.
Daughter.
Daughter of his son or daughter.

Degrees of affinity or alliance prohibited.

A man may not marry his

Father's wife.
Uncle's wife.
Father's wife's daughter.
Brother's wife.
Wife's sister.
Son's wife or wife's daughter.
Daughter of his wife's son or daughter.

Of the woman's part.

A woman may not marry her

Father.
Father's brother.
Mother's brother.
Brother.
Son.
Son of her son or daughter.

A woman may not marry her

Mother's husband.
Aunt's husband.
Sister's husband.
Husband's brother.
Daughter's husband.
Son of her husband's son or daughter.
And

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And according hereunto a table was set forth, in the year 1563, as followeth.

An admonition to all such as shall intend hereafter to enter the state of matrimony godly and agreeable to the laws :

First, That they contract not with such persons as be hereafter expressed, nor with any of like degree, against the law of god, and the laws of the realm.

Secondly, That they make no secret contracts, without consent and counsel of their parents or elders, under whose authority they be, contrary to god's laws, and man's ordinances.

Thirdly, That they contract not anew with any other, upon divorce and separation made by the judge for a time, the laws yet standing to the contrary.

A man may not marry his

Secundus gradus in linea recta
ascendente,

<i>Conf.</i>	<i>Avia.</i>	1	Grandmother.
<i>Affin.</i>	<i>Avi relicta.</i>	2	Grandfather's wife.
<i>Affin.</i>	<i>Proscrus, vel socrus magna.</i>	3	Wife's grandmother.

Secundus gradus inæqualis in linea
transversali ascendente.

<i>Conf.</i>	<i>Amita.</i>	4	Father's sister.
<i>Conf.</i>	<i>Matertera.</i>	5	Mother's sister.
<i>Affin.</i>	<i>Patru relicta.</i>	6	Father's brother's wife.
<i>Affin.</i>	<i>Avunculi relicta.</i>	7	Mother's brother's wife.
<i>Affin.</i>	<i>Amita uxoris.</i>	8	Wife's father's sister.
<i>Affin.</i>	<i>Matertera uxoris.</i>	9	Wife's mother's sister.

Primus gradus in linea recta
ascendente.

<i>Conf.</i>	<i>Mater.</i>	10	Mother.
<i>Affin.</i>	<i>Noverca.</i>	11	Stepmother.
<i>Affin.</i>	<i>Socrus.</i>	12	Wife's mother.

Primus gradus in linea recta
descendente,

<i>Conf.</i>	<i>Filia.</i>	13	Daughter.
<i>Affin.</i>	<i>Privigna.</i>	14	Wife's daughter.
<i>Affin.</i>	<i>Nurus.</i>	15	Son's wife.

Primus gradus æqualis in linea
transversali,

<i>Conf.</i>	<i>Soror.</i>	16	Sister.
<i>Affin.</i>	<i>Soror uxoris.</i>	17	Wife's sister.
<i>Affin.</i>	<i>Fratris relicta.</i>	18	Brother's wife.

Secundus gradus in linea recta
descendente.

<i>Conf.</i>	<i>Neptis ex filio.</i>	19	Son's daughter.
<i>Conf.</i>	<i>Neptis ex filia.</i>	20	Daughter's daughter.
<i>Affin.</i>	<i>Pronurus, i. relicta nepotis ex filio.</i>	21	Son's son's wife.
<i>Affin.</i>	<i>Pronurus, i. relicta nepotis ex filia.</i>	22	Daughter's son's wife.
<i>Affin.</i>	<i>Privigni filia.</i>	23	Wife's son's daughter.
<i>Affin.</i>	<i>Privigna filia.</i>	24	Wife's daughter's daughter.

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Secundus gradus inæqualis in linea
transversali descendente,

- | | |
|--|-------------------------------|
| <i>Conf.</i> Neptis ex fratre. | 25 Brother's daughter. |
| <i>Conf.</i> Neptis ex sorore. | 26 Sister's daughter. |
| <i>Affin.</i> Nepotis ex fratre relicta. | 27 Brother's son's wife. |
| <i>Affin.</i> Nepotis ex sorore relicta. | 28 Sister's son's wife. |
| <i>Affin.</i> Neptis uxoris ex fratre. | 29 Wife's brother's daughter. |
| <i>Affin.</i> Neptis uxoris ex sorore. | 30 Wife's sister's daughter. |

A woman may not marry with her

Secundus gradus in linea recta
ascendente,

- | | |
|--------------------------|---|
| 1 Grandfather. | <i>Conf.</i> Avus. |
| 2 Grandmother's husband. | <i>Affin.</i> Aviae relictus. |
| 3 Husband's grandfather. | <i>Affin.</i> Profocer, vel focer magnus. |

Secundus gradus inæqualis in linea
transversali ascendente,

- | | |
|-------------------------------|-----------------------------------|
| 4 Father's brother. | <i>Conf.</i> Patruus. |
| 5 Mother's brother. | <i>Conf.</i> Avunculus. |
| 6 Father's sister's husband. | <i>Affin.</i> Amitæ relictus. |
| 7 Mother's sister's husband. | <i>Affin.</i> Materteræ relictus. |
| 8 Husband's father's brother. | <i>Affin.</i> Patruus mariti. |
| 9 Husband's mother's brother. | <i>Affin.</i> Avunculus mariti. |

Primus gradus in linea recta
ascendente,

- | | |
|----------------------|-------------------------|
| 10 Father. | <i>Conf.</i> Pater. |
| 11 Stepfather. | <i>Affin.</i> Vitricus. |
| 12 Husband's father. | <i>Affin.</i> Socer. |

Primus gradus in linea recta
descendente,

- | | |
|------------------------|--------------------------|
| 13 Son. | <i>Conf.</i> Filius. |
| 14 Husband's son. | <i>Affin.</i> Privignus. |
| 15 Daughter's husband. | <i>Affin.</i> Gener. |

Primus gradus æqualis in linea
transversali,

- | | |
|-----------------------|---------------------------------|
| 16 Brother. | <i>Conf.</i> Frater. |
| 17 Husband's brother. | <i>Affin.</i> Levir. |
| 18 Sister's husband. | <i>Affin.</i> Sororis relictus. |

Secundus gradus in linea recta
descendente,

- | | |
|-----------------------------------|--|
| 19 Son's son. | <i>Conf.</i> Nepos ex filio. |
| 20 Daughter's son. | <i>Conf.</i> Nepos ex filia. |
| 21 Son's daughter's husband. | <i>Affin.</i> Progener, i. relictus neptis ex filio. |
| 22 Daughter's daughter's husband. | <i>Affin.</i> Progener, i. relictus neptis ex filia. |
| 23 Husband's son's son. | <i>Affin.</i> Privigni filius. |
| 24 Husband's daughter's son. | <i>Affin.</i> Privignæ filius. |

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Secundus gradus inæqualis in linea
transversali descendente,

25 Brother's son.	<i>Conf.</i> <i>Nepos ex fratre.</i>
26 Sister's son.	<i>Conf.</i> <i>Nepos ex sorore.</i>
27 Brother's daughter's husband.	<i>Affin.</i> <i>Neptis ex fratre relictus.</i>
28 Sister's daughter's husband.	<i>Affin.</i> <i>Neptis ex sorore relictus.</i>
29 Husband's brother's son.	<i>Affin.</i> <i>Leviri filius, i. nepos mariti ex fratre.</i>
30 Husband's sister's son.	<i>Affin.</i> <i>Gloris filius, i. nepos mariti ex sorore.</i>

1. It is to be noted, that those persons which be in the direct line ascendent and descendent, cannot marry together, altho' they be never so far asunder in degree.

2. It is to be noted, that consanguinity and affinity (letting and dissolving matrimony) is contracted as well in them and by them which be of kindred by the one side, as in and by them which be of kindred by both sides.

3. Item, that by the laws, consanguinity and affinity (letting and dissolving matrimony) is contracted as well by unlawful company of man and woman, as by lawful marriage.

4. Item, in contracting betwixt persons doubtful, which be not expressed in this table, it is most sure first to consult with men learned in the laws, to understand what is lawful, what is honest and expedient, before the finishing of their contracts.

5. Item, that no parson vicar or curate shall solemnize matrimony out of his or their cure or parish-church or chapel, and shall not solemnize the same in private houses, nor lawless or exempt churches, under the pains of the law forbidding the same; and that the curate have their certificates, when the parties dwell in divers parishes.

6. Item, the banns of matrimony ought to be openly denounced in the church by the minister, three several sundays or festival days; to the intent that who will and can alledge any impediment, may be heard, and that stay may be made till further trial, if any exception be made there against it, upon sufficient caution.

7. Item, Who shall maliciously object a frivolous impediment against a lawful matrimony, to disturb the same, is subject to the pains of the law.

8. Item, Who shall presume to contract in the degrees prohibited (tho' he do it ignorantly) besides that the fruit of such copulation may be judged unlawful, is also punishable at the ordinary's discretion.

9. Item, if any minister shall conjoin any such, or shall be present at such contracts making, he ought to be suspended from his ministry for three years, and otherwise to be punished according to the laws.

10. Item, it is further ordained, that no parson vicar or curate do preach treat or expound, of his own voluntary invention, any matter of controversy in the scriptures, if he be under the degree of a master of arts, except he be licensed by his ordinary thereunto, but only for the instruction of the people, read the homilies already set forth, and such other form of doctrine as shall be hereafter by authority published: and shall not innovate or alter any thing in the church, or use any old rite or ceremony, which be not set forth by publick authority.

And so much concerning the table of degrees, which by reason of the canon here next following it hath been thought requisite to insert intire, together with the previous admonitions and the subsequent observations: altho' some of the said observations (as particularly that concerning the publication of banns on festival days) are now abrogated.

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By which canon it is ordained, that *no person shall marry within the degrees prohibited by the laws of god, and expressed in a table set forth by authority in the year of our lord 1563; and all marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so married shall by course of law be separated. And the aforesaid table shall be in every church publickly set up, at the charge of the parish.* Can. 99.

Before the said statute of the 32 H. 8. c. 38. other prohibitions than god's law admitteth, were invented by the court of Rome; the dispensation whereof they always reserved to themselves: as for instance, in kindred and affinity between cousin germans, and so to the fourth degree: as also, carnal knowledge of any of the same kin or affinity before in such outward degrees. But now by this act, all persons are declared to be lawful to contract matrimony, that be not prohibited by god's law to marry; and that no reservation or prohibition (god's law excepted) shall trouble or impeach any marriage without the levitical degrees. So as, without question, the son of the father by another wife, and the daughter of the mother by another husband, and so on the contrary, may marry. 2 Inst. 684.

For the better understanding of which prohibitions, together with the grounds and limitations of them; it may not be improper to mention some special rules, which have been laid down for that end, both by lawyers and divines. As,

First, that marriages in the ascending and descending line, that is, of children with their father, grandfather, mother, grandmother, and so upwards, are prohibited without limit; because they are the cause (immediate or mediate) of their being; and it is directly repugnant to the order of their nature, which hath assigned several duties and offices, essential to each, that would thereby be inverted and overthrown. A parent cannot obey a child; and therefore it is unnatural, that a parent should be wife to a child: a parent, as a parent, hath a natural right to command and correct a child; and that a child, as husband, should command and correct the same parent, is unnatural. To which we may add, the inconsistency, absurdity, and monstrousness of the relations to be begotten, if such prohibition were not absolute and unlimited. The son or daughter, for instance, born of the mother, and begotten by the son; considered as born of the mother, would be a brother or sister to the father; but as begotten by him, would be a son or daughter. So the issue procreate upon the grandmother; as born of the grandmother, will be uncles or aunts to the father; but as begot by the son, they will be sons or daughters to him, and this in the first degrees of kindred. *Gibbs. 412.*

Further, There are several degrees, which altho' not expressly named in the levitical law, are yet prohibited by that, and by the statute of the 32 H. 8. c. 38. by parity of reason. Which is thus illustrated in the *reformatio legum*: This in the levitical degrees is to be observed, that all the degrees by name are not expressly set down; for the holy ghost there did

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did only declare plainly and clearly such degrees, from whence the rest might evidently be deduced. As, for example, where it is prohibited that the son shall not marry his mother, it followeth also, that the daughter shall not marry her father. And by injoining that a woman shall not marry her father's brother; the like reason requireth that she shall not marry her mother's brother. To which the same book adds two particular rules, for our direction in this matter: 1. That the degrees which are laid down as to men, will hold equally as to women in the same proximity. 2. That the husband and wife are but one flesh; so that he who is related to the one by consanguinity, is related to the other by affinity in the same degree. *Gibf.* 412.

Upon the foregoing rule, from parity of reason (which is also acknowledged and laid down by the books of common law) rests the prohibition against marrying a wife's sister; which is well expressed by bishop *Jewel* in his printed letter upon that point: "Albeit (says he) I be not forbidden by plain words, to marry my wife's sister; yet I am forbidden so to do by other words, which by exposition are plain enough. For when god commands me that I shall not marry my brother's wife, it follows directly by the same, that he forbids me to marry my wife's sister. For between one man and two sisters, and one woman and two brothers, is like analogy or proportion." And when this point of marrying the wife's sister, came under consideration in the court of king's bench, *M. 25 C. 2.* in the case of *Hill and Good*, tho' it was alleged, that the precept *prima facie* seemed to be only against having two sisters at the same time, and prohibition to the spiritual court was granted; yet in the trinity term next following, after hearing civilians they granted a consultation, as in a matter within the statute of the 32 *H. 8.* tho' the former statute of the 28 *H. 8.* had never been revived, which yet it virtually was; and there, as in the statute of the 25 *H. 8.* the wife's sister is expressly prohibited. *Gibf.* 412. *Vaugh.* 302. 3 *Keb.* 166.

Upon the like parity of reason, in the case of *Wortley and Watkinson*, a consultation was granted, where one had married the daughter of the sister of his former wife; which (as Sir John King laid the argument) is the same degree of proximity, as the nephew's marrying his father's brother's wife; and this being expressly prohibited, the other by parity of reason is so likewise; as it had been declared, *E. 16 f.* in *Rennington's* case, before the high commissioners. Which point was again argued *T. 1 An.* in the case of *Snowling and Nursey*, and consultation granted as before, notwithstanding the case of *Richard Parsons* mentioned by lord *Coke*, 1 *Inst.* 235. in which it was first determined not to be within the levitical degrees, and prohibition granted; but a consultation being awarded on debate two years after, that case is said to have been expunged out of the first Institute, by order of the king and council. And this was the very point in which (presently after the making of the act) lord *Cromwell* desired a dispensation for one *Massey*, who was contracted, to his sister's daughter of his late wife: but the archbishop denied it, as

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contrary to the law of god, and gave for reason, that as several persons are prohibited, which are not expressed, but understood by like prohibition in equal degree; so in this case, it being expressed that the nephew shall not marry his uncle's wife, it is implied, that the niece shall not be married to the aunt's husband. *Gibf.* 412, 413.

Much less can it be doubted, whether the like rule concerning parity of reason, doth not forbid the uncle to marry his niece, which tho' not expressly forbidden, is virtually prohibited in the precept, that forbids the nephew to marry the aunt; nor is it of moment to alledge, that the first is a more favourable case, as the natural superiority is preserved; since the parity of *degree*, which is the proper rule of judging, is the very same. *Gibf.* 413.

But where in the case of *Harrison and Burwell*, T. 20 C. 2. in the spiritual court, one had married the wife of his great uncle; this was declared, not to be within the levitical degrees; and accordingly, after the opinion of all the judges taken by the king's special command, a prohibition was granted. *Gibf.* 413.

By the civil law, first cousins are allowed to marry; but by the canon law, both first and second cousins (in order to make dispensations more frequent and necessary) are prohibited. Therefore when it is vulgarly said, that first cousins may marry, but second cousins cannot; probably this arose by confounding these two laws: for first cousins may marry by the civil law, and second cousins cannot by the canon law. *Wood Civ. L.* 118, 119. *Ayl. Par.* 364.

But now, by the aforesaid statute of the 32 H. 8. c. 38. it is clear, that both first and second cousins may marry.

The kindred of the husband are not of affinity to the kindred of the wife; and therefore the husband's brother may marry the wife's sister, as well as the husband's son by a former wife may marry the wife's daughter by a former husband. The affinity is terminated in the husband himself from the wife's kindred, and in the wife herself from the husband's kindred. *Wood Civ. L.* 119.

H. 7 W. Hains and Jephcott. A day was appointed to hear counsel, why a prohibition should not be granted to the spiritual court of Worcester, to stay a suit against *Hains* for marrying with the *bastard* daughter of his sister. And it was argued for the prohibition, that this is not prohibited by any law, for there is neither affinity nor consanguinity, for a bastard is *nullius filius*. On the contrary it was urged, that the levitical law is, *ad proximum sanguinis non accedat*; that the jews made no difference, as to marriage, between bastards and others; that tho' bastards are deprived of certain privileges by particular laws, yet the same reason prohibits them from marriage as others: And by this rule a man might marry his own bastard; which doubtless could not be allowed. And the court inclined not to grant a prohibition; but the cause was adjourned, and it appears not what became of it. *L. Raym.* 68. *5 Mod.* 168. *Gibf.* 413.

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In the case of *Ellerton* and *Gastrel*; where *Ellerton* had married the daughter of the sister of his former wife, this was declared to be within the prohibition of the levitical degrees. *Gibf.* 412. *Comyns* 318.

If a man marry one within the degrees prohibited, the issue between them is not by the common law a bastard, until there be a divorce; for by that law, the marriage is not till then void. *God.* 486.

4. They which be dumb, and cannot speak, may contract matrimony Dumb per-
by signs; which marriage is lawful and available to all intents. *Swinb.* sons.
Matr. Con. f. 15.

5. One who is an idiot from his birth, may consent in marriage; and Idiots.
his issue shall be legitimate. *1 Roll's Abr.* 357.

6. By the ancient law of England, if any christian man did marry with Jews.
a woman that was a jew, or a christian woman did marry with a jew;
it was felony, and the party so offending should be burnt alive.
3 Inst. 89.

The author of *Fleta* saith, that such offender should be buried alive.
Fleta 54.

But where both parties are jews, they are allowed to marry; and are
not under the restraints (as was before observed) of the statute of the
26 G. 2. c. 33.

7. By the civil law, the woman is forbidden to marry again, within the ~~Widow's~~
year (as it is called) of mourning, unless there is a special dispensation
from the prince; by reason of the uncertainty to which husband the issue
may belong, and because a reverential mourning and pious regard to the
memory of her deceased husband is in decency expected. *Wood Civ. L.*
124. *2 Domat* 126.

And lord Coke says; for the avoiding of such like inconveniences,
this was the law before the conquest——Let every widow continue
unmarried for twelve months; and if she shall marry, let her lose her
dower. *1 Inst.* 8.

But the divine and the canon law leave no such injunctions. *WCCA*
Civ. L. 122.

Also by the common law of England, a widow is not prohibited from
marrying at any time after her husband's death.

8. *Langton.* Persons beneficed or in holy orders shall not presume to ~~Priests~~
keep concubines publicly in their houses, nor elsewhere shall have pub-
lick access to them with scandal. If the concubines, after publick ad-
monition, shall not depart; they shall be expelled from the churches
which they shall so presume to defame, and they shall not be admitted
to the sacraments. And if they still persist, let them be excommuni-
cated, and the secular arm be invoked against them. And the clerks,
after canonical admonition, shall be deprived of their office and benefice.
Lind. 125.

Langton. If clergymen leave ought by their wills to concubines, it
shall go to the church. *Lind.* 166.

Weber's head.

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Wetherhead. Clergymen under the office of subdeacon may keep their wives; but subdeacons or above shall leave their women whether such women do consent to it or not. *Lind.* 128.

Otko. Clergymen who publickly keep concubines shall put them away, on pain of suspension from their office and benefice. *Atkon* 41.

Otkubon. None shall let houses to clerks who keep concubines. *Atkon* 92.

By the 1 *H.* 7. c. 4. It shall be lawful to all archbishops bishops and other ordinaries having episcopal jurisdiction, to punish and chastise priests clerks and religious men, being within the bounds of their jurisdiction, as shall be convicted before them by examination and other lawful proof requisite by the law of the church, of advoutry, fornication, incest, or any other fleshly incontinency, by committing them to ward and prison, there to abide for such time as shall be thought to their discretions convenient for the quality and quantity of their trespass.

By the 31 *H.* 8. c. 14. (which was altered by the 32 *H.* 8. c. 10. here next following, and which was finally repealed by the 1 *Ed.* 6. c. 12.) it was enacted as followeth: A priest keeping company with a *wife*, to the evil example of other persons; shall be guilty of felony, as shall also the woman. And if any priest shall keep a *concubine*, to the evil example of other persons; he shall forfeit his goods and spiritual promotions, and be imprisoned during the king's pleasure: and if he shall again offend, he shall be guilty of felony. And the women shall have like punishment as the priests.

By the 32 *H.* 8. c. 10. (which is repealed as to *wives* by the 2 & 3 *Ed.* 6. c. 21. here next following, but continues in its force as to *concubines*;) The penalties of the aforesaid statute of the 31 *H.* 8. are mitigated; and for both offences alike, the priest shall *only* forfeit (as it is there expressed) for the first offence all his goods and spiritual promotions except one; for the second offence, all his goods, and also during his life all the profits of his lands and of his spiritual promotions; and for the third offence, all his goods, and also during his life all the profits of his lands and of his spiritual promotions, and be imprisoned during life. And the woman offending, if she be unmarried, shall for the first offence forfeit all her goods; for the second offence, all her goods and half the issue of her lands during life; for the third offence, all her goods and the issues of all her lands during life, and imprisonment during life: if she be married, she shall for the first offence be imprisoned for all the term of her life, at the king's will and pleasure.

By the 2 & 3 *Ed.* 6. c. 21. (which was repealed by the 1 *Mar.* sess. 2. c. 2. and revived by the 1 *J.* c. 25.) All and every law and laws positive, canons, constitutions, and ordinances, heretofore made by authority of man only, which do prohibit or forbid marriage to any ecclesiastical or spiritual person or persons, of what estate condition or degree they be, or by what name or names soever they be called, which by god's law may lawfully marry, in all and every article branch and sentence concerning

ing only the prohibition for the *marriage* of the persons aforesaid, shall be utterly void and of none effect.

And by the 5 & 6 Ed. 6. c. 12. (which also was repealed by the 1 Mar. sess. 2. c. 2. and revived by the 1 J. c. 25.) The matrimony of all and every priest and other ecclesiastical and spiritual person, which shall be duly had celebrated and made; shall be adjudged deemed and taken for true and lawful matrimony, to all intents constructions and purposes.

Note, that by these ancient canons, concubinage seemeth to have been partly connived at; only the publick avowance thereof was discouraged. And by the aforesaid statute of the 31 H. 8. marriage, of the two, is esteemed the greater offence; and by the 32 H. 8. both offences are rendered equal: the penalties of which latter statute (as was observed) do still continue in force with respect to *concubinage*, altho' by the 2 & 3 Ed. 6. they are abrogated as to *marriage*. And by the 5 & 6 Ed. 6. the clergy, as to the point of matrimony, are put upon the same footing with all other persons. In queen Mary's time, king Edward's laws being repealed, the clergy were again brought under the severe laws of king Henry 8. and so continued during all that reign, and (which is remarkable) during also the whole reign of queen Elizabeth. Yet nevertheless the thirty nine articles were passed in convocation and confirmed by the royal authority in the fifth year of that queen, in the year of our lord 1562; and ratified anew by her in the year 1571. The thirty second of which articles is as follows:

Bishops, priests, and deacons, are not commanded by god's law, either to vow the estate of single life, or to abstain from marriage; therefore it is lawful for them, as for all other christian men, to marry at their own discretion, as they shall judge the same to serve better to godliness.

Which perhaps may be accounted for from this; that queen Elizabeth was always averse from the parliament's interfering in ecclesiastical affairs; and therefore might think that her sole allowance and ratification of this (amongst the other articles of religion) would be sufficient in this matter, without expressly repealing the statute of queen Mary. Or perhaps, in order to have the clergy more dependent, she might be willing that this matter should continue doubtful. However by the statute of the 1 J. c. 25. all foundation for any further question is taken away, which expressly revives the aforesaid statutes of Ed. 6. and so the law hath continued ever since.

9. By the 14 & 15 H. 8. c. 8. Whereas of old time accustomed hath been used in the high court of chancery, that all manner of clerks and ministers of the same court, writing to the great seal, should be unmarried (except only the clerk of the crown), so that as well the cursitors and other clerks, as the six clerks of the said chancery were by the same custom restrained from marriage, whereby all those that contrary to the same did marry were no longer suffered to write in the said chancery, not only to their great hindrance, losing thereby the benefit of their long study and tedious labours and pains in youth taken in the said court, but also to the great decay of the true course of the said court; and forasmuch as

now

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now the said custom taketh no place nor usage, but only in the office of the said six clerks, but that it is permitted for maintenance of the said course, that as well the said cursitors as the other clerks afore said may and do take wives, and marry at their liberty, after the laws of holy church, and of long time have so done, without interruption or let of any person: therefore in consideration of the premisses, and for that the said custom is not grounded upon any law, it is enacted, that all persons who shall be in the office of the six clerks of the chancery, may take wives and marry at their liberty, after the laws of holy church; and shall hold their offices notwithstanding in as ample manner as if they had never been married.

Doctors of the
civil law.

10. By the 37 *H. 8. c. 17.* (which was repealed by the 1 & 2 *P. & M. c. 8. f. 27.* and revived by the 1 *El. c. 1. f. 12.*) All persons, as well lay as those that be married, being doctors of the civil law, lawfully create and made in any university, who shall be constituted chancellor, vicar general, commissary, official, scribe, or register, may lawfully execute and exercise all manner of jurisdiction, commonly called ecclesiastical jurisdiction, and all censures and coercions appertaining or in any wise belonging to the same, albeit such persons be lay, married, or unmarried; so that they be doctors of the civil law as afore said.

II. Of marriage contracts.

Spousals, what.

1. Spousals *de futuro*, are a mutual promise or covenant of marriage to be had afterwards; as when the man saith to the woman, I will take thee to my wife; and she then answereth, I will take thee to my husband: Spousals *de presenti*, are a mutual promise or contract of present matrimony; as when the man doth say to the woman, I do take thee to my wife, and she then answereth, I do take thee to my husband. *Swinb. Matr. Con. f. 3.*

Not to be
made private-
ly.

2. *Raynolds.* The ministers shall frequently denounce to those who are desirous to contract matrimony; that, on pain of excommunication, they do not contract matrimony, but in an open place, and before divers witnesses in publick. *Lind. 271.*

Age for con-
tracting.

3. Both by the civil and canon law, infants under seven years of age cannot contract any kind of spousals. *Swinb. f. 6.*

From the age of seven, to the age of twelve as to the woman, and of fourteen as to the man, they cannot contract matrimony *de presenti*, but only *de futuro*. *Swinb. f. 7.*

A man so soon as he hath accomplished the age of fourteen years, and a woman so soon as she hath accomplished the age of twelve years, may contract true and lawful matrimony. *Swinb. f. 9.*

But by *Can. 105.* No children under the age of one and twenty years compleat, shall contract themselves without the consent of their parents, or of their guardians and governors if their parents be deceased.

Part of the
portion refer-
ved.

4. By the civil law, the woman is not constrained to bring her whole substance as a portion to her husband, but may retain back part of her goods,

goods, which are then called *paraphernalia* (from *para* besides, and *phen* dower), in which the husband hath no interest; for she may dispose of it without his consent, and bring actions in her own name, or in the name of the husband, for recovering the same. *Wood. Civ. L. 123.*

In England we account the paraphernalia to be only the woman's wearing apparel, jewels, and personal ornaments, which she wore during her marriage; suitable to the quality of her husband. *id.*

And a wife after the death of her husband may claim her paraphernalia, or necessary apparel for her body, cloth given her to make a garment, and the like, besides her dower or jointure. But she shall not have excessive apparel, beyond her rank or degree. Pearl necklaces, chains of diamonds, gold watches, and such like, may be included under paraphernalia, if they were usually worn by the wife, and were suitable to her degree, according to the fashion of the times. *1 Roll's Abr. 911.*

5. Heretofore, if any having contracted matrimony *de presenti*, and being convented by the ecclesiastical judge, did refuse to execute the sentence given by him to celebrate the matrimony accordingly, after lawful admonition given in that behalf; he or she so refusing might for their contumacy or disobedience therein be excommunicated, and be imprisoned on a writ *de excommunicato capiendo*, until he or she did submit to obey the monition of the ordinary in that behalf. *Swinb. f. 17.*

What remedy shall be upon the contract.

But as for persons who had contracted spousals only *de futuro*, if either of them did refuse to perform their promise, the judge was not to proceed to the *significavit* into chancery for an *excommunicato capiendo*, but rather to absolve that cursed party which contemned the censures of the church, albeit there might be no cause of favour, but for fear of further mischief, by compelling them to go together which did hate one another: yet was not this froward party thus to be dismissed, but was to suffer penance for the breach of his promise: nor was he or she to be dismissed or absolved, if those spousals *de futuro* by reason of carnal knowledge or some other act equivalent did become matrimony; for in that case as in the former where spousals were contracted *de presenti*, the disobedient party was to be excommunicated, apprehended, and imprisoned; and not to be absolved or released before satisfaction, or death, or other just cause of divorce. *id.*

But now by the 26 G. 2. c. 33. No suit or proceeding shall be had in any ecclesiastical court, in order to compel a celebration of any marriage *in facie ecclesie*, by reason of any contract of matrimony, whether *per verba de presenti*, or *per verba de futuro*, which shall be entred into after the twenty fifth day of march 1754. f. 13.

But notwithstanding, the party is not the less liable to damages for the same, in an action to be brought upon the case.

6. T. 5 & 6 G. 2. *Holt* against *Ward* clarencieux king at arms. Mrs. Infant's contract, how far binding.
Holt the plaintiff declared, that it was mutually agreed between the defendant Mr. *Ward* and her self, that they should marry at a future day, which is past, and that in consideration of each other's promises, each

engaged to the other; notwithstanding which, he did not marry her, but had married another; which she lays to her damage of 4000*l*. The defendant, with leave of the court, pleaded double: viz. first, that he made no such promise; and secondly, that Mrs. *Holt* the plaintiff at the time of the promise was an infant of fifteen years of age. The plaintiff joins issue upon the former point, and a verdict was found for her, with 2000*l* damages; and as to the plea of infancy demurred. This cause was argued several times at the bar. Upon the first argument, the court were strongly inclined with the plaintiff, because tho' the defendant would not have the same remedy against her by action for damages, yet they thought he might have some remedy, to wit, by the ecclesiastical court, to compel a performance, the plaintiff being of the age of consent, and that would be a sufficient consideration; and therefore appointed an argument by civilians, to see what their law would determine in such a case. Upon the argument of the civilians, no instance could be shewn, wherein they had compelled the performance of a minor's contract. And they who argued for the defendant strongly insisted, that in the case of a contract *per verba de futuro* (as this was), there was no remedy, even against a person of full age, in the spiritual court, but only an admonition: And the only reason why they hold jurisdiction in the case of a contract *per verba de presenti* was, because that is looked upon amongst them to be *ipsum matrimonium*, and they only decree the formality of a solemnization in the face of the church. After their arguments, it was spoken to again. And now this term *Raymond* chief justice delivered the resolution of the court: The objection in this case is, that the plaintiff not being bound equally with the defendant, this is *nudum pactum*, and the defendant cannot be charged in this action. Formerly it was made a doubt by my lord Vaughan, whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. And as to the present case, we should have had no difficulty in giving judgment for the plaintiff, if we could have been satisfied by the arguments of the civilians, that as the plaintiff was of the age of consent, any remedy, tho' not by way of action for damages, could be had against her. But since they seem to have no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether this contract, as against the plaintiff, was absolutely void. And we are all of opinion, that this contract is not void, but only voidable at the election of the infant: and as to the person of full age, it absolutely binds. The contract of an infant is considered in law, as different from the contracts of all other persons. In some cases his contract shall bind him: such is the contract of an infant for necessaries, and the law allows him to make this contract, as necessary for his preservation; and therefore in such case a single bill shall bind him, tho' a bond with a penalty shall not. Where the contract may be for the benefit of the infant, or to his prejudice; the law so far protects him, as to give him an opportunity to consider it when he comes of age: and it is good, or voidable, at his election. But tho' the infant hath this privilege; yet the party with whom he contracteth, hath not: he is bound in all events. And

as marriage is looked upon as an advantageous contract, and no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant; we think, that tho' no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infants contracts. And no dangerous consequence can follow from this determination, because our opinion protects the infant even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts. For these reasons we are all of opinion, that the plaintiff ought to have her judgment upon the demurrer. *Str.* 937.

7. *E. 3 An. Hatton and Mansel.* It was held by *Holt* chief justice, that if there be an express promise by the man, and it appear the woman countenanced it, and by her actions at that time behaved her self as if she agreed to the matter, altho' there be no actual promise, yet that shall be sufficient evidence of a promise on her part. *Read. Tit. Marriage.* What consent shall amount to a contract.

But if the one only promiseth, and the other doth not, either expressly, or by implication; this is a contract that walks upon one leg, and consequently not of any force. *Hy. Parerg.* 246.

III. Of banns.

1. *Bann*, is a saxon word, and signifieth a proclamation. Banns, what.

2. No minister shall be obliged to publish the banns of matrimony between any persons whatsoever, unless they shall seven days at the least before the time required for the first publication, deliver or cause to be delivered to him a notice in writing of their true christian and surnames, and of the houses of their respective abodes within such parish chapelry or extraparochial place where the banns are to be published, and of the time during which they have inhabited or lodged in such houses respectively. Previous notice.

26 G. 2. c. 33. f. 2.

3. And all banns of matrimony shall be published in the parish church, or in some publick chapel wherein banns of matrimony have been usually published, of the parish or chapelry wherein the persons to be married shall dwell. 26 G. 2. c. 33. f. 1. Where.

And where the persons to be married shall dwell in divers parishes or chapelries, the banns shall be published in the church or chapel belonging to such parish or chapelry wherein each of the said persons shall dwell. *id.*

And where both or either of the persons to be married shall dwell in an extraparochial place (having no church or chapel wherein banns have been usually published), then the banns shall be published in the parish church or chapel belonging to some parish or chapelry adjoining to such extraparochial place. *id.*

Note, that all parishes where there shall be no parish church or chapel belonging thereto, or none wherein divine service shall be usually celebrated

Marriage.

ted every Sunday, may be deemed extraparochial places for the purposes of this act, but for no other purpose. f. 5.

Provided, that after the solemnization of any marriage under a publication of banns, it shall not be necessary in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published; nor shall any evidence in such case be received to prove the contrary, in any suit touching the validity of such marriage. f. 10.

When.

4. And the said banns shall be published upon three Sundays preceding the solemnization of marriage, during the time of morning service, or of the evening service if there be no morning service in such church or chapel on any of those Sundays, immediately after the second lesson. 26 G. 2. c. 33. f. 1.

Proclamation.

5. *Raynolds.* Whilst the marriage is contracting, the ministers shall inquire of the people by three public banns, concerning the freedom of the parties from all lawful impediments. And if any minister shall do otherwise, he shall be suspended for three years. *Lind.* 271.

Rubr. And the curate shall say after the accustomed manner; "I publish the banns of marriage between M. of——— and N. of———"
"If any of you know cause or just impediment, why these two persons should not be joined together in holy matrimony, ye are to declare it:"
"This is the first (second, or third) time of asking."

Dissent of parents or guardians.

6. And in case the parents or guardians or one of them, of either of the parties who shall be under the age of twenty one years, shall openly and publickly declare or cause to be declared in the church or chapel where the banns shall be so published, at the time of such publication, his dissent to such marriage; such publication of banns shall be void. 26 G. 2. c. 3. f. 3.

Certificate.

7. *Rubr.* And where the parties dwell in divers parishes, the curate of the one parish shall not solemnize matrimony betwixt them, without a certificate of the banns being thrice asked, from the curate of the other parish.

And by the 26 G. 2. c. 33. Where the banns shall be published in any church or chapel belonging to any parish adjoining to any extraparochial place as aforesaid, the minister publishing such banns shall in writing under his hand certify the publication thereof, in such manner as if either of the parties to be married dwelt in such adjoining parish. f. 1.

The form of which certificate may be to this effect: "I do hereby certify, that the banns of marriage between A. B. of the parish of Orton in the County of Westmorland, and C. D. of the parish of Ravenston-dale in the county aforesaid, have been duly published in the parish church of Orton aforesaid, on three several Sundays, to wit, Oct. 27. Nov. 3. and Nov. 10. now last past; and that no cause or just impediment hath been declared, why they may not be joined together in holy matrimony. Witness my hand, Nov. 13. 1762.

Ri. Burn,

Vicar of Orton aforesaid."

IV. Of

IV. Of licence.

1. Some have questioned the bishop's power to grant licences for Who may marrying without banns first published; because this is dispensing with grant. an act of parliament: for the marriage office, which requires banns, is part of the statute law. But this power of dispensing is granted to the bishop by statute law too, viz. by the 25 H. 8. c. 21. by which all bishops are allowed to dispense as they were wont to do; and such dispensations have been granted by bishops, ever since archbishop *Mepham's* time at least. *Johns.* 194.

By *Can.* 101. No faculty or licence shall be granted for solemnization of matrimony without publication of banns, by any person exercising any ecclesiastical jurisdiction or claiming any privileges in the right of their churches; but only by such as have episcopal authority, or the commissary for faculties, vicars general of the archbishops and bishops *sede plena* or *sede vacante*, the guardian of the spiritualities, or ordinaries exercising of right episcopal jurisdiction in their several jurisdictions respectively.

And by the 26 G. 2. c. 33. No surrogate deputed by any ecclesiastical judge, who hath power to grant licences of marriage, shall grant any such licence, before he hath taken an oath before the said judge, faithfully to execute his office according to law, to the best of his knowledge, and hath given security by his bond in the sum of 100*l* to the bishop of the diocese, for the due and faithful execution of his said office. s. 7.

2. And no licence shall be granted, but unto such persons only, as be To whom. of good state and quality. *Can.* 101.

3. And no licence shall be granted, but upon good caution and se- Security to be curity taken. *Can.* 101. given, and oath to be made.

Which security shall contain these conditions: 1. That at the time of granting such licence, there is not any impediment of precontract, consanguinity, affinity, or other lawful cause, to hinder the said marriage. 2. That there is not any controversy or suit depending in any court, before any ecclesiastical judge, touching any contract or marriage of either of the said parties with any other. 3. That they have obtained thereunto the express consent of their parents (if they be living), or otherwise of their guardians or governors. Lastly, that they shall celebrate the said matrimony publickly in the parish church or chapel where one of them dwelleth, and in no other place, and that between the hours of eight and twelve in the forenoon. *Can.* 102.

And for the avoiding all fraud and collusion in the obtaining of such licences and dispensations; before such licence shall be granted, it shall appear to the judge by the oaths of two sufficient witnesses, one of them to be known either to the judge himself, or to some other person of good reputation then present, and known likewise to the said judge, that the express consent of the parents, or parent (if one of them be dead), or guardians or guardian of the parties, is thereunto had and obtained: And furthermore, that one of the parties shall personally swear, that he believeth

Marriage.

believeth that there is no let or impediment of precontract, kindred, or alliance, or of any other lawful cause whatsoever, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony, according to the tenor of the foresaid licence. *Can. 103.*

But if both the parties which are to marry, being in widowhood, do seek a faculty for the forbearing of banns; then the clauses before mentioned, requiring the parents consents, may be omitted: but the parishes where they dwell, both shall be expressed in the licence, as also the parish named where the marriage shall be celebrated. And if any commissary for faculties, vicars general, or other the said ordinaries shall offend in the premises or any part thereof; he shall for every time so offending be suspended from the execution of his office for the space of six months; and every such licence or dispensation shall be held void to all effects and purposes, as if there had never been any such granted; and the parties marrying by virtue thereof, shall be subject to the punishments which are appointed for clandestine marriages. *Can. 104.*

Which clause declaring the licence *void to all effects and purposes as if there had never been any such granted*, seemeth to render it a matter of great importance that the afore said prerequisites be strictly observed; for altho' before the statute of the 26 G. 2. only the licence in such case was void, and the parties marrying by virtue thereof were liable to be punished as for a clandestine marriage, yet now by the said statute the marriage also will be void, and the other consequences of clandestine marriages will ensue.

Stamp.

4. By the 5 W. c. 21. For every skin or piece of vellum or parchment, or sheet or piece of paper, upon which any licence for marriage shall be ingrossed or written, shall be paid a stamp duty of 5 s. s. 3.

Licence where
to run.

5. No licence of marriage shall be granted by any archbishop, bishop, or other ordinary or person having authority to grant the same, to solemnize any marriage in any other church or chapel, than in the parish church or publick chapel of the parish or chapelry, within which the usual place of abode of one of the persons to be married shall have been for the space of four weeks immediately before the granting such licence; or where both or either of the parties shall dwell in an extraparochial place having no church or chapel wherein banns have been usually published, then in the parish church or chapel belonging to some parish or chapelry adjoining to such extraparochial place; and in no other place whatsoever. 26 G. 2. c. 33. s. 4.

Provided, that where the marriage is by licence, it shall not be necessary, in support of such marriage, to give any proof that the usual place of abode of one of the parties for the space of four weeks as afore said, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in such case be received to prove the contrary, in any suit touching the validity of such marriage. s. 10.— That is to say, this shall not avail so as to render the marriage null and void; but nevertheless, the surrogate who granteth such licence contrary to the tenor of this act, seemeth to incur the violation of his oath, and forfeiture of his bond

bond given to the spiritual judge; and is liable to be otherwise punished for his contempt of the law.

Also this shall not extend to deprive the archbishop of Canterbury, and his proper officers, of the right which hath hitherto been used, in virtue of the statute of the 25 H. 8. c. 21. of granting special licences to marry at any convenient time or place. f. 6.

By which statute of the 25 H. 8. power is given to the archbishop of Canterbury, to grant faculties, dispensations, and licences; as the pope had done before. And by the same statute it is enacted, that all children procreated after solemnization of any marriages to be had by virtue of a licence or dispensation from the archbishop of Canterbury, shall be admitted reputed and taken legitimate in all courts and other places, and inherit the inheritance of their parents and ancestors.

6. If any person shall falsely make, alter, forge, or counterfeit any such licence of marriage; or cause or procure the same to be done; or assist therein; or utter or publish the same as true, knowing the same to be false, altered, forged, or counterfeited: he shall be guilty of felony without benefit of clergy. 26 G. 2. c. 33. f. 16. Forging licence.

V. *When and where to be solemnized; and therein of clandestine marriages.*

1. In all cases where *banns* shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns have been published, and in no other place. 26 G. 2. c. 33. f. 1. When and where.

And no licence marriage shall be solemnized in any other church or chapel, than where the usual place of abode of one of the parties hath been for the space of four weeks next before the granting of such licence. f. 4.

And by *Can. 63.* Every minister who shall celebrate marriage between any persons contrary to the canons afore said, or any part thereof, under colour of any peculiar liberty or privilege claimed to appertain to certain churches and chapels, shall be suspended for three years, by the ordinary of the place where the offence shall be committed: and if any such minister shall afterwards remove from the place where he hath committed the fault, before he be suspended; then shall the bishop of the diocese, or ordinary of the place where he remaineth, upon certificate under the hand and seal of the other ordinary from whose jurisdiction he removed, execute that censure upon him.

By a constitution of archbishop *Reynolds*: Matrimony shall be solemnized reverently, and *in the face of the church.* Lind. 271.

And by the words in the beginning of the office of matrimony, it is supposed to be done *in the presence of the congregation.*

And in the case of a marriage by licence, it is required by *Can. 62.* that the same shall be solemnized *between the hours of eight and twelve in the forenoon; and in time of divine service.*

Ecclesiastical
punishment of
clandestine
marriages.

2. Stratford. *Persons contracting matrimony, and causing the same to be solemnized, knowing any canonical impediments in that behalf, or having strong presumption thereof; shall ipso facto incur the sentence of the greater excommunication.* Lind. 277.

Mepham. *Every priest, who shall presume to celebrate matrimony any where save in the parish church [where one of the parties or their friends do inhabit; Johns.] without the special licence of the diocesan; or who shall be present thereat; shall be suspended from his office for a whole year.* Lind. 274.

Stratford. *The foregoing constitution shall be extended to chapels, having of old time had parochial rights: and the priest shall incur the said pain ipso facto.* Lind. 277.

Of old time] That is, for forty years at least. *Id.*

Stratford. *Priests, who shall knowingly make solemnization of marriages prohibited, or of lawful matrimony between others than their own parishioners, without the licence of the diocesans, or of the proper curates of the persons contracting; also they who shall cause by force or fear clandestine marriages to be solemnized in churches oratories or chapels, or shall be present thereat, knowing the same; shall incur the sentence of the greater excommunication, and be otherwise punished as the law directs.* Lind. 276.

Between others than their own parishioners] That is, where neither of the parties is of their own parish. *Id.*

Without the licence of the diocesans] Who having cure throughout the whole diocese, have power to grant licences in all places within their diocese. *Id.*

Or of the proper curates] That is, as to their own parishioners only. *Id.*

Or shall be present thereat] And such person would not be admitted in the spiritual court to prove such marriage, until he should be legally absolved from the sentence incurred thereby.

Canon 62. *No minister, upon pain of suspension for three years ipso facto, shall celebrate matrimony between any persons, without a faculty or licence, or without banns published; neither shall any minister, upon the like pain, under any pretence whatsoever, join any persons so licensed in marriage at any unseasonable times, but only between the hours of eight and twelve in the forenoon, nor in any private place, but either in the churches or chapels where one of them dwelleth, and likewise in time of divine service; nor when banns are thrice asked (and no licence in that respect necessary) before the parents or governors of the parties to be married, being under the age of twenty and one years, shall either personally, or by sufficient testimony, signify to him their consents given to the said marriage.*

Upon pain of suspension] In our ecclesiastical records, we frequently meet with absolutions of clergymen who had celebrated marriages clandestinely; and so late as archbishop Sancroft's time, we find the intire process of such an absolution: but in the more ancient registers, towards
the

the beginning of the reformation, one and the same dispensation issued, for the minister and the two parties; which sort (as well as separate dispensations) are very common in our books. *Gibf.* 425.

Without a faculty or licence] Such faculties have been very various, in point of extent; in many instances requiring a publication, sometimes once, and dispensing with two; in other cases twice, and dispensing but with one; and again in other cases expressly requiring all the three publications, and dispensing only with time or place. Instances of all which, especially before the reformation, are very common in our ecclesiastical records. *Gibf.* 425.

At any unseasonable times] That is, of the day, not of the year; concerning which latter head, there seem to be no prohibitions expressed, or plainly supposed, in our constitutions or canons. But there is a place in *Lindwood*, which not only implies a prohibition of times in general, but expressly mentions the times prohibited. Which is, that the solemnization of marriage cannot be from the first sunday in advent, until the octaves of epiphany exclusive; and from septuagesima sunday, to the first sunday after easter inclusive; and from the first rogation day, until the seventh day after pentecost inclusive: altho' marriage may be *contracted* within these times. *Gibf.* 430. *Lind.* 274. *Ayl. Par.* 364.

It is also certain, that a distinction of times hath been observed, as the law of our reformed church; not only from the clause which we may observe in several licences in our books, *quocunque anni tempore*; but also from a remarkable dispute which happened in archbishop *Parker's* time, between the master of the faculties and the vicar general, whether the first only, or the second in conjunction with him, had a right to grant licences on that particular head. *Gibf.* 430.

And after that, in archbishop *Whitgift's* table of fees, there is first a fee for a licence to solemnize matrimony *without banns*, and afterwards a fee for a licence to solemnize matrimony *in the time of prohibition of banns to be published*.

Which point is further confirmed, by the attempts that have been made in parliament and convocation, to take away that distinction of times: In parliament, in the 17th of Elizabeth, a bill was depending, intituled, an act declaring marriages lawful at all times: And in convocation, in the year 1575, the last of the articles presented to the queen for confirmation (but by her rejected) was, that the bishops shall take order, that it be published and declared in every parish church within their diocese, before the first day of May next coming, that marriage may be solemnized at all times of the year. Which goes further than what had been projected upon that head in the year 1562, when the scheme intended to be offered to the parliament or convocation or both, was, that it shall be lawful to marry at any time of the year, without dispensation; except it be upon christmas day, easter day and six days going before, and upon whitunday. *Gibf.* 430.

Marriage.

But these distinctions, being invented only at first as a fund (amongst many others) for dispensations, and being built upon no rational foundation, nor upon any law of the church of England, have vanished of themselves; and it may be justly questioned, whether if a minister should refuse to marry any persons within the times pretended to be prohibited, an action upon the case would not lie against him for such refusal: for supposing that heretofore any popish canons, importing such prohibition, were received in this kingdom; yet now they can be of no force, as being contrary to the common law, which for the benefit of the subject, and in favour of the natural rights of mankind, and for the publick emolument, alloweth matrimony at all times of the year without restraint.

Before the parents or governors shall signify their consents] But by the 26 G. 2. c. 33. no minister solemnizing marriages between persons, both or one of whom shall be under the age of twenty one years, after banns published, shall be punishable by ecclesiastical censures for solemnizing such marriages without consent of parents or guardians whose consent is required by law, unless he shall have notice of the dissent of such parents or guardians. s. 3.

Pecuniary forfeitures.

3. By the 6 & 7 W. c. 6. No person shall be married at any place pretending to be exempt from the visitation of the bishop of the diocese, without a licence, except the banns shall be published and certified according to law: and every parson, vicar, and curate, who shall marry any persons contrary to the true intent hereof, shall forfeit 100l. half to the king, and half to him that will sue in any of his majesty's courts of record; and for the second offence, shall be suspended from his office and benefice for three years. s. 52.

And by the 7 & 8 W. c. 35. Every parson, vicar, or curate, who shall marry any persons in any church or chapel, exempt or not exempt, or in any other place whatever, without publication of banns, or without licence, shall forfeit 100l. s. 2.

And every parson, vicar, or curate, who shall substitute or employ, or knowingly and wittingly shall suffer and permit, any other minister to marry any persons in any church or chapel to such parson vicar or curate belonging or appertaining, without publication of banns or licence; shall forfeit 100l. s. 3.

The said forfeitures to be half to the king, and half to him that shall sue. s. 3.

And every man so married without licence or publication of banns as aforesaid, shall forfeit 10l. to be recovered with costs in manner as aforesaid, by him who shall sue: and every sexton, or parish clerk, or other person acting as sexton or parish clerk, who shall knowingly and wittingly aid promote and assist, at such marriages so celebrated without banns or licence as aforesaid, shall forfeit 5l. to be recovered with costs of suit in manner as aforesaid, by him who shall sue. s. 4.

And by the 10 An. c. 19. Whereas great loss hath happened of the duties upon stamped vellum parchment and paper, and other inconveniences daily grow from

from clandestine marriages; it is enacted, that every parson vicar or curate, or other person in holy orders, beneficed or not beneficed, who shall marry any person in any church or chapel, exempt or not exempt, or in any other place whatsoever, without publication of banns, or without licence from the proper ordinary, shall forfeit 100*l*, with full costs, half to the queen, and half to him that will sue in any of the courts of record at Westminster; and if such offender shall be a prisoner in any prison or gaol (other than a county gaol) at the time of such offence committed, and shall be duly convicted thereof, then upon oath made of such imprisonment before one of the judges, and upon producing a copy of the record of such conviction to be likewise proved upon oath before the said judge, he shall grant his warrant to the keeper of the gaol or prison where such offender is a prisoner, to remove him to the gaol of that county where he is a prisoner, there to remain charged in execution with the penalty inflicted by this act, and with all and every the causes of his former imprisonment: And if any gaoler or keeper of any prison, shall be privy to, or knowingly permit any marriage to be solemnized in his said prison, before publication of banns or licence as aforesaid; he shall forfeit 100*l*, to be recovered and distributed as aforesaid. s. 176.

Saving nevertheless, to all archbishops bishops archdeacons and other ordinaries, their vicars-general commissaries and officials, the free exercise of all ecclesiastical jurisdiction, and full power and authority of inflicting all such pains and censures for this or any other crime or crimes, as they might have done if this act had not been made. s. 177.

And provided, that the said provision for marriages do not extend to that part of Great Britain called Scotland. s. 178.

Upon the aforesaid statute of the 7 & 8 W. c. 35. s. 4. in the case of Middleton and his wife against Croft, M. 10 G. 2. In prohibition: The plaintiff declared, that by the said statute a penalty of 10*l* is inflicted on every man who marries without licence or banns; notwithstanding which, he and his wife had been cited into the spiritual court, for being married before eight in the morning, without licence or banns, contrary to the canon, which fixes the time to be between eight and twelve, and requires a licence or banns; that they are lay persons, not bound by the canon; and therefore pray a prohibition. The defendant, as to the contempt, pleads not guilty; and for a consultation, demurs. And after several arguments at bar, lord Hardwick chief justice this term delivered the resolution of the court: — In this case three questions have been made; 1. Whether by the canons of 1603, lay persons are punishable for a clandestine marriage. 2. If not, whether by the canon law anciently received, the spiritual court hath a jurisdiction to proceed for a clandestine marriage. And, 3. Supposing they have a jurisdiction either way, whether that jurisdiction is taken away by the act of parliament, which hath inflicted a penalty of 10*l*. As to the first: two things are considerable, first, whether the laity are within the words of those canons as to this matter; secondly, whether there was a proper authority to bind the laity, if the words do extend to them. And as to the question, whether the words take them in; those which any way relate to this

matter are the canons 62, 101, 102, 103, and 104. In the four first of which, there are no words that affect the parties contracting: Indeed in the 104th there are words relating to the married persons, but they relate only to marriages under void or irregular licences, which is not this case: And therefore upon this point we are all of opinion, that lay persons are not within the words of the canons of 1603. The next point is, whether the makers of those canons had a power to bind the laity: And we are all of opinion that proprio vigore the canons of 1603 do not bind the laity; I say, proprio vigore, because some of them are only declaratory of the ancient canon law. The second point to be considered is, whether laying aside the canons of 1603, the spiritual court hath any jurisdiction under the former canon law received and allowed, to proceed against the plaintiffs for a clandestine marriage: And we are all of opinion, that in this respect their jurisdiction is well founded. And as to the third point, whether the statute of the 7 & 8 *W.* hath by inflicting that penalty taken away the jurisdiction of the spiritual court; it is to be observed, that as to the woman, she indisputably remains subject to the ecclesiastical jurisdiction, for the penalty is only upon the man; but as to the man likewise, we are all of opinion, that the ecclesiastical jurisdiction is not taken away by the statute, but that both the jurisdictions do well stand together. And upon the whole we are of opinion, that there ought to go a consultation as to all the points of the suit below but one, which is, the hour at which the marriage is alledged to have been had. Now as the confining marriages to be between eight and twelve in the morning, is only a regulation introduced by the canons of 1603, which we have determined do not bind in this case; it is of consequence, that the spiritual court be restrained from making that any ground of their proceedings. In this respect therefore, the prohibition must stand, and a consultation must go for the rest. *Str.* 1056.

In the aforesaid statute of the 10 *An. c.* 19. there is a proviso (as hath been inserted) that the same shall not extend to that part of Great Britain called Scotland. And there is also a proviso to the like effect, in the statute of the 26 *G. 2. c.* 33. which seemeth in practice to be extended further than what may reasonably be supposed to have been the intention of the legislature. There may be good cause not to extend the said statute of the 26 *G. 2.* to marriages bona fide and without fraud had and celebrated within that kingdom: But it is plainly eluding the act, for an English man and an English woman just to pass over the borders into the Scottish territories, and there intermarry without either banns or licence or other prerequisite.

It is hoped, that no clergyman of the church of Scotland will encourage such a practice. But their concurrence is not absolutely necessary. The parties own servant whom they carry along with them, or the host at the inn where they shall be, may be sufficient as to the validity of the marriage, altho' not as to all the legal fruits and effects of it.

Felony.

4. By the 26 *G. 2. c.* 33. If any person shall solemnize matrimony in any other place than a church or publick chapel where banns have been

been usually published, unless by special licence from the archbishop of Canterbury; or shall solemnize matrimony without publication of banns, unless licence be first had from some person having authority to grant the same; every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be adjudged guilty of felony, and transported for fourteen years. f. 8. (Except in Scotland, and except the marriages of quakers or jews as aforesaid. f. 18.)

The prosecution for such felony to be commenced within three years after the offence committed. f. 9.

5. *T. 9 An. Haydon and Gould.* Before the delegates. It appeared that Haydon and Rebecca his wife were sabbatarians, and were married by one of their ministers in a sabbatarian congregation: the form in the common prayer book was used, except the ceremony of the ring. They lived together as man and wife for seven years, and then Rebecca died. Whereupon Haydon took out letters of administration to her. But Gould and Margaret his wife, who was sister to Rebecca, sued a repeal, suggesting that Rebecca and Haydon were never married. And it appearing that the minister who married them was a mere layman, and not in orders, the letters of administration which had been granted to Haydon as her husband were repealed, and a new administration granted to the said Margaret Gould her sister. And this sentence, upon an appeal, was affirmed by the court of delegates. For it was held, that as Haydon demanded a right to himself as husband by the ecclesiastical law, he ought to prove himself a husband by that law: And so the court ruled. And a case was cited out of Swinburn, where such a marriage had been ruled to be void, as to the privileges attending legal marriages. And it is observed in that case, that an act of parliament was thought necessary after the grand rebellion, to intitle people who had been married by justices of the peace, to such legal advantages of dower, thirds, and the like, as attended marriages duly solemnized according to the rites of the church of England; and the act of the 7 & 8 W. c. 35. seems to put this matter out of all doubt, which lays a penalty on clergymen in orders, if they celebrate marriage in a clandestine manner; for if the same privileges and advantages attended marriages solemnized by the dissenters, as those celebrated according to the church of England, how easily would that act be evaded, or rather rendered of no effect. There would then be no occasion for licence or banns; for making oath; or giving security that there were no legal impediments: but every one might do what was right in his own eyes, who should get himself admitted of a dissenting congregation. *Read. Tit. Marriage. 1 Salk. 119.*

And if the temporal court should write to the bishop, to certify whether accoupled in lawful matrimony or not; it seemeth that the bishop would certify, that persons not married according to the form of the church of England as by law established, were not accoupled in lawful matrimony.

And if a person applies to the spiritual court for some benefit by the ecclesiastical law, in virtue of a precedent marriage; it seemeth that he ought to intitle himself according to the rules of that law.

Marriage.

But marriages by Romish priests, whose orders are acknowledged by the church of England, have been deemed to have the effects of a legal marriage, at least in some instances; as in the case of Mr. *Fielding*, who was married by a Romish priest to Mrs. *Wadsworth*: This was held to be such a marriage, as to make it felony in him to marry afterwards to the duchess of *Cleveland*. Read. *Tit. Mar.*

And in *Wigmore's* case, *M. 5 An.* where the wife sued in the spiritual court for alimony, and in fact the husband was an anabaptist, and altho' he had a licence from the bishop to marry, yet he married this woman according to the forms of their own religion; Holt chief justice, upon the prohibition, said, By the canon law, a contract *per verba de presenti* is a marriage, so is a contract *per verba de futuro* if the contract be executed and he does take her; this is a marriage, and they cannot punish for fornication, but only for not solemnizing the marriage according to the forms prescribed by law, but not so as to declare the marriage void. 2 *Salk.* 438.

But now, by the 26 G. 2. c. 33. If any person shall solemnize matrimony (except in Scotland, and except quakers and jews as aforesaid) in any other place than in a church or publick chapel where banns have been usually published, unless by special licence from the archbishop of Canterbury; or shall solemnize the same without lawful banns or licence: such marriage shall be null and void to all intents and purposes whatsoever. f. 8.

VI. Form of solemnization.

Witnesses
present.

1. By the statute of the 26 G. 2. c. 33. All marriages shall be solemnized in the presence of two credible witnesses at the least, besides the minister; who shall sign their attestation thereof. f. 15.

Impediments
alledged.

2. And at the time of the celebration of the marriage; the minister reciting the causes for which matrimony was ordained, shall say, "If any man can shew any just cause why they may not lawfully be joined together, let him now speak, or else hereafter for ever hold his peace." *Rubr.*

And then, speaking unto the persons that shall be married, he shall say; "I require and charge you both, as ye will answer at the dreadful day of judgment when the secrets of all hearts shall be disclosed, that if either of you know any impediment, why ye may not be lawfully joined together in matrimony, ye do now confess it; for be ye well assured, that so many as are coupled together otherwise than god's word doth allow, are not joined together by god, neither is their matrimony lawful." *Rubr.*

At which day of marriage, if any man do alledge and declare any impediment why they may not be coupled together in matrimony by god's law, or the laws of this realm; and will be bound, and sufficient sureties with him, to the parties, or else put in a caution (to the full value of such charges as the persons to be married do thereby sustain) to prove his

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his allegation; then the solemnization must be deferred until such time as the truth be tried. *Rubr.*

3. If no impediment be alledged, then the marriage shall go on; and after the parties have declared their mutual assent, and have taken each other in marriage according to the form prescribed, then the man shall give unto the woman a ring, laying the same upon the book, with the accustomed duty to the priest and clerk. And the priest taking the ring, shall deliver it unto the man, to put it on the fourth finger of the woman's left hand; and the man holding the ring there, and taught by the priest, shall say, "With this ring I thee wed, with my body I thee worship, and with all my worldly goods I thee endow." *Rubr.*

Which last words are best explained by the rubrick of the 2 *Ed. 6.* which was thus: "The man shall give unto the woman a ring, and other tokens of spousage, as gold or silver, laying the same upon the book, and the man taught by the priest shall say, With this ring I thee wed, this gold and silver I thee give;" and then these other words, "with all my worldly goods I thee endow," were delivered with a more peculiar significancy.

The ring at first (according to *Swinburn*) was not of gold but of iron, adorned with an adamant; the metal hard and durable, signifying the durance and perpetuity of the contract. Howbeit (he says) it skilleth not at this day, what metal the ring be of: The form of it being round and without end, doth import, that their love should circulate and flow continually. The finger on which this ring is to be worn, is the fourth finger of the left hand, next unto the little finger, because there was supposed a vein of blood to pass from thence unto the heart. *Swinb. Matr. Cont. sect. 15.*

In the Roman ritual, there is a benediction of the ring, and a prayer that she who wears it may continue in perfect love and fidelity to her husband, and in the fear of god all her days.

4. By the rubricks of the 2. and of the 5 *Ed. 6.* The new married persons were required on the same day of their marriage to receive the holy communion. *Sacrament.*

But by the present rubrick, it is only declared to be convenient, that the new married persons should receive the holy communion, at the time of their marriage, or at the first opportunity afterwards.

5. By the rubricks of the 2. and of the 5 *Ed. 6.* After the gospel was to be a sermon, wherein ordinarily the office of man and wife should be declared, according to holy scripture; or if there were no sermon, then the minister was to read several sentences out of scripture, setting forth the said duties. *Sermon.*

And by the present rubrick, If there be no sermon declaring the duties of man and wife, then the minister shall read the same sentences as aforesaid.

Marriage.

VII. Fee for marriage.

Langton. *We do firmly injoin, that no sacrament of the church shall be denied to any one upon the account of any sum of money, nor shall matrimony be hindred therefore: because if any thing hath been accustomed to be given by the pious devotion of the faithful, we will that justice be done thereupon to the churches by the ordinary of the place afterwards.* Lind. 278.

That no sacrament of the church] Which were seven; of which, matrimony was one.

Shall be denied] Or delayed. Lindw. 278.

Upon the account of any sum of money] That is, used to be paid or taken in the administration of any of the sacraments. Lindw. 278.

Nor shall matrimony be hindred therefore] But by the rubrick in the office of matrimony, at the time of delivering the ring, the man shall also then lay down the accustomed duty to the priest and clerk. Which if he shall refuse to do; whether the minister is bound to proceed nevertheless, doth not appear from any rubrick or canon.

Hath been accustomed to be given] That is, of old, and for so long time as will create a prescription, altho' at first given voluntarily. For they who have paid so long, are presumed at first to have bound themselves voluntarily thereunto. Lindw. 279.

And this, it is said, is recoverable by law, in such places and cases only, where there is a custom for the payment thereof, upon performance of the duty. *Bok. L. of Tith. 144, 5.*

Mr. Johnson says, it was an ancient custom, that marriage should be performed in no other church but that to which the woman belonged as a parishioner; and therefore to this day, the ecclesiastical law allows a fee due to the curate of that church, whether she be married there or not. And this fee was expressly reserved for him by the words of the licence, according to the old form, which is not yet disused in all dioceses. But it is said, that judgment hath been otherwise given in the temporal courts. *Johns. 188, 189.*

So in the case of *Thompson and Davenport, M. 13 W.* The plaintiff libelled against the defendant, setting forth a custom in the parish of Ellington in Derbyshire, that of every woman who is a parishioner, and dwelleth there, and marieth with a licence, the husband at the time of the marriage, or soon after, shall pay to the vicar 5s as an accustomed fee; and so brought his case within that custom: the defendant suggested for a prohibition, that all customs are triable at common law, and that the plaintiff had libelled against him, setting forth the custom as aforesaid. And a prohibition was granted. *Lutw. 1059.*

And in a late case, upon an appeal to the Arches, Sir George Lee not only declared against the custom as an unreasonable custom, but gave costs against the clergyman with some warmth.

VIII. Register

VIII. Register of marriage.

By the 26 G. 2. c. 33. The churchwardens and chapelwardens of every parish or chapelry shall provide proper books of vellum or good and durable paper, in which all marriages and banns of marriage respectively there published or solemnized shall be registred; and every page thereof shall be marked at the top with the figure of the number of every such page, beginning at the second leaf with number one; and every leaf or page so numbred shall be ruled with lines at proper and equal distances from each other, or as near as may be; and all banns and marriages published or celebrated in any church or chapel, or within any such parish or chapelry, shall be respectively entred, registred, printed, or written, upon or as near as conveniently may be to such ruled lines, and shall be signed by the parson vicar minister or curate, or by some other person in his presence and by his direction; and such entries shall be made as aforesaid on or near such lines in successive order, where the paper is not damaged by accident or length of time. And all books provided as aforesaid, shall be deemed to belong to such parish or chapelry respectively. f. 14.

And immediately after the celebration of every marriage, an entry thereof shall be made in such register; in which entry or register it shall be expressed, that the said marriage was celebrated by banns or licence; and if both or either of the parties married by licence be under age, with consent of the parents or guardians as the case shall be; and shall be signed by the minister with his proper addition, and also by the parties married, and attested by two witnesses present at the solemnization of such marriage. f. 15.

Which entry shall be made in the form or to the effect following; viz.

A. B. of the
this parish ————— and C. D. of the
this parish —
————— were married in this church
chapel by banns
licence with consent of
parents
guardians this ——— day of ——— in the year ———

By me J. J. Rector
Vicar
Curate

This marriage was solemnized between us A. B. in the presence of E. F.
C. D. G. H.

f. 15.

And if any person shall knowingly and wilfully insert or cause to be inserted in such register book any false entry of any matter or thing relating to any marriage; or falsly make alter forge or counterfeit, or cause or procure to be falsly made altered forged or counterfeited, or assist in falsly making altering forging or counterfeiting, any such entry in such register,

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register ; or utter or publish as true any such false altered forged or counterfeited register as aforesaid, or a copy thereof, knowing the same to be false altered forged or counterfeited ; or if any person shall wilfully destroy, or cause or procure to be destroyed, any register book of marriages, or any part thereof, with intent to avoid any marriage, or to subject any person to any of the penalties of this act : he shall be guilty of felony without benefit of clergy. f. 16.

IX. Certificate of marriage.

By the 5 *W. c.* 21. For every piece of vellum, parchment, or paper, upon which any certificate of marriage (except of the marriage of a seaman's widow) shall be ingrossed or written, shall be paid a stamp duty of 5s. And if any person shall write such certificate upon the same before it be stamped, he shall forfeit 5l.

X. Trial of marriage.

By the ecclesiastical judge.

1. Dr. *Godolphin* says, that marriage was at first tried in the temporal courts : but afterwards, by the concession of princes, such causes were determined in the spiritual courts. *God.* 489.

And the reason why the cognizance thereof hath been permitted to the ecclesiastical judge, are divers ; especially, because matrimony was heretofore a sacrament of the church ; and the office being performed by clergymen, this of consequence brings the performance under the diocesan's inspection ; and in the case of the levitical degrees in particular ecclesiasticks are presumed to be the best judges of what is prohibited by god's law.

As to the lawfulness of marriage.

2. The lawfulness of marriage is to be tried by the bishop's certificate, upon an issue, *accoupled in lawful matrimony or not* ; as in a writ of dower, appeal, bastardy, or the like. 1 *Inst.* 134.

But whether a woman is a feme covert, or whether she is the wife of such a person, is triable by a jury upon such an issue. Therefore a marriage *de facto*, or in reputation (as amongst the quakers) hath been allowed by the temporal courts to be sufficient to give title to a personal estate, because the lawfulness of the marriage is not in issue, or the point to be tried. For the issue is, whether a marriage was contracted betwixt the parties or not, or whether the parties lived in a married estate, where the legality of it doth not come in question. *Wood b. 1. c. 6.*

In the act of 6 & 7 *W. c.* 6. laying a duty upon marriages ; quakers and jews, cohabiting as man and wife, were required to pay the said duty, altho' not married *according to the law of England* : And there was a proviso, that nothing therein contained should be construed to make good or effectual in law any such marriage or pretended marriage ; but that they should be of the same force, and no other, as if the said act had not been made.

But in the act of the 26 G. 2. c. 33. there is no proviso of the like purport; but rather the act proceeds upon a supposition that such marriages are good and valid.

And in the aforefaid case of *Haydon* and *Gould*, it was said, that tho' the husband, demanding a right due to him as husband, by the ecclesiastical law, must prove himself a husband according to that law, before he can be intitled to it; and if he do not, shall not reap benefit by his own fault: yet the wife who is the weaker sex, and the children who were in no fault, may intitle themselves to a temporal right, by such marriage; which (as was urged) cannot be called a mere nullity, because by the law of nature the contract was sufficient; but only an irregularity, in not complying with a positive law. *Gibf.* 430.

3. In writs of dower or other writs brought in the king's temporal courts, if issue be joined upon *not accoupled in lawful matrimony*, this being a cause which is merely ecclesiastical, the trial thereof must be by the bishop or ordinary, upon an inquisition taken before him as judge. Which is after this manner: The king first sends his writ to the bishop to make the inquiry; for the ecclesiastical judge, before he hath received the king's writ, may not of himself inquire of the lawfulness of the matrimony; but after such time as he hath received the said writ to make the inquiry, he must not surcease for any appeal or inhibition, but must proceed until he hath certified the king's court thereof: and then when the bishop hath received the king's writ, he doth give notice thereof unto the party who took exception to the matrimony, at his dwelling house if he hath any within the diocese, to speak at a day prefixed by him against the matrimony if he will; and after such notice given, whether the party come or not, the witnesses of the demandant to prove the legality of the matrimony are taken, and admitted by the bishop, if no sufficient exception be taken to the witnesses. After the depositions taken, they are published, and certified into the king's court where the issue was joined, by letters under the seal of the bishop, importing that in pursuance of the said writ he hath made due inquiry, according to the ecclesiastical laws, into the matters therein contained; and that he hath found by lawful proofs, and other canonical requisites in that behalf, that such persons (as the case shall be) was or was not accoupled in lawful matrimony. For he must certify the point in issue generally, and not make a special verdict of it, or express the manner of the marriage at large. And after such certificate made, there shall be no appeal, but the same certificate shall be a bar, and conclude all parties for ever. And after such certificate, and re-summons of the tenant in the king's temporal court, judgment shall be given for the plaintiff. *Hughes* 293, 294. Bishop's certificate.

4. In the case of *Harrison* and *Burwell* before mentioned, it was observed, that no prohibition was to be found in the Register or elsewhere, concerning the questioning of any marriage in the spiritual court, in all the time before the acts of parliament, and long after some of them; and it was also confessed, that neither the act of the 25 H. 8. nor 28 H. 8. gave any jurisdiction to the temporal courts concerning marriages, more Prohibition.

than they had before; being acts only directory to the ecclesiastical proceeding in matters of marriage. But it was declared, that by the 28 H. 8. the temporal courts are become the proper judges what marriages are within or without the levitical degrees, and are to prohibit the spiritual courts if they impeach any persons for marriages without those degrees. But *Vaughan* declared in this case (and repeated that declaration in the case of *Hill and Good*) that if granting prohibitions to the spiritual courts in cases of matrimony, were *res integra* now, he saw no reason why they should be granted in any case; but that there having been so many precedents of prohibitions, and no complaint, or at least redress, in parliament, they could not take upon them to alter the course of the law so long practised. *Gibf.* 413.

The latter of these two cases, was in the 25 C. 2.; and in the 34 C. 2. a prohibition was prayed to the spiritual court at York, to hinder a prosecution there for marrying the sister's daughter. But it was denied by the whole court upon this general reason; because it is a cause of ecclesiastical cognisance, and divines better know how to expound the law of marriages than the common lawyers; and tho' sometimes prohibitions have been granted in causes matrimonial, yet if it were now *res integra*, they would not be granted. And it being suggested in that case, that the issue of the marriage would be bastardized in case of a divorce, and deprived of certain lands settled upon them in marriage; the court said, this was not sufficient matter of suggestion, for here the spiritual court held not plea of the temporal inheritance directly, but only consequentially; for which if they should be prohibited, they would have nothing left. *Gibf.* 413. *Raym.* 464. *Skin.* 37.

And in the case of *Denny and Ashwell*, E. 3 G. a prohibition was denied to a suit in the spiritual court, for a person's marrying his wife's sister's daughter. *Str.* 53.

Evidence.

5. The proof of a marriage may be by witnesses who were present at the solemnization; by cohabitation of the parties; by publick fame and reputation; by confession of the married persons themselves, altho' their acknowledgment might only be to avoid the punishment of fornication; and by divers other circumstances; which if they amount to a half proof, ought to be extended in favour of marriage rather than contrary to it. *Wood Civ. L.* 122.

But now, since the statute of the 26 G. 2. c. 33. the register book seems to be intended as the proper, altho' not the only, evidence in this matter; for if there shall be any doubt as to the identity of the persons, or the like, the register in this respect can be no evidence at all.

In the case of *St Devereux and Muchdewchurch*, E. 2 G. 3. with regard to the settlement of a poor person, there was proof of a marriage by two witnesses, who swore they were present on February the 7th, 1758, when a marriage was solemnized in the parish church of *St Devereux*, between *John* and *Susanna Meredith* by the minister of the parish by banns. An entry was made in the register, that they were married by banns; but it was not signed by the minister, parties, or witnesses. *Lord Mans-*

field,

field, chief justice, held this to be a sufficient proof of the marriage, so as to fix the settlement of the wife in the husband's parish; but said, he would *ex officio* grant a rule upon the minister, to shew cause why an information should not be granted against him, for not attesting the entry agreeable to the statute.

In truth, there is a great mistake in many persons, supposing, where an act of parliament inflicteth no special penalty for disobedience, that they may transgress such act, without any danger of being called to account; whereas nothing is more certain, than that where an act appointeth no particular punishment, the offender is liable to be punished by fine and imprisonment, upon indictment or information, at the discretion of the court. So that an act inflicting no particular penalty, is in the highest degree penal; so far as a man's liberty or property may be affected. Which consideration is applicable, not only to the present case, where registers are not regularly kept according to the statute; but also to the case, where surrogates shall grant licences to marry in parishes or places where neither of the parties doth inhabit; or where a clergyman shall presume to marry such persons, neither of them being his own parishioner: As also, where a minister shall take upon him to publish the banns, not immediately after the second lesson, as this act requireth: but after the Nicene creed, as was before enjoined by the rubrick. For if a father should attend, immediately after the second lesson, to forbid the banns, where his child is under age; and no publication being then made, should go away, and the publication afterwards proceed; the clergyman, making such publication, would not be in a desirable situation. Indeed, it doth not appear, why the time, as it is now limited, immediately after the second lesson, is more proper than the other time was, after the Nicene creed; or rather, it seemeth to be less proper, because immediately after the second lesson the publication makes a manifest break and interruption in the service; but after the Nicene creed there is a pause, that part of the service being then compleated. However, so the matter stands; and it is not in the discretion of any private person to judge of the propriety or impropriety; and therefore, this being the law, the rubrick after the Nicene creed in this particular ought to be altered; and the rather, as it may prevent a mistake of some persons, who may think that the rubrick in this respect is still in force, not considering, that altho' the rubrick is confirmed by act of parliament (and is indeed itself part of an act of parliament), yet no maxim in the law is more established, than that a subsequent contrary act virtually repeals a preceding act, so far forth as it is contrary; and may also prevent perhaps another mistake of those who may suppose, that the rubrick, together with the book of common prayer, before it received the sanction of parliament, having been drawn up by the clergy in convocation, received its whole force by ecclesiastical authority, and needed no parliamentary confirmation; but, on the contrary, that the parliament have nothing to do with it, either to confirm or alter it. This was once the notion of ecclesiasticks; but the foundation thereof was abolished, with the papal power, out of this realm, above 200 years ago.

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ago. What now remains of it, if any thing doth remain, is a shadow without any substance. An empire within an empire, two distinct legislatures in one kingdom, independent of each other, and both of them pretending to be absolute, have been long since found to be absurd and incompatible.

Sentence in
the spiritual
court conclu-
sive.

6. H. 7 G. 2. Before lord *Hardwick* chief justice, at *nisi prius* in Middlesex. There was an action for maliciously procuring the plaintiff's wife to exhibit articles of the peace against him, and for living with her in adultery. The plaintiff proved a marriage, by the parson and a woman, and also the consummation. To encounter which, the defendant produced a sentence of the consistory court of London, in a cause of jactitation of marriage brought by the woman against the plaintiff, wherein she was declared free from all contract, and perpetual silence imposed upon the plaintiff: which sentence was pronounced since issue joined in this cause. And the chief justice ruled this to be conclusive evidence, till reversed by appeal. *Str.* 960.

And a few days afterwards, at Guildhall, in another cause, between *Dacosta* and *Villa Real*, which was an action upon a contract of marriage *per verba de futuro*, brought by the gentleman against the lady, who pleaded *non assumpsit*; when the plaintiff had opened his case, the defendant offered in evidence a sentence of the spiritual court in a cause of contract, where the judge had pronounced against the suit for a solemnization in the face of the church, and declared Mrs. *Villa Real* free from all contract. And the chief Justice held this to be proper and conclusive evidence on *non assumpsit*; that it was a cause within their jurisdiction, tho' the contract was *per verba de futuro*, and tho' the suit there is *diverso intuitu*, being for a specific performance, as far as admonition will go; and this, for damages. Yet contract or no contract is the point in issue in both. And the plaintiff was nonsuit. And herein was cited the case of *Hatfield* against *Hatfield*, in the house of lords, in the year 1725; where, on an appeal from Ireland, the case was, that a woman brought a bill against her supposed husband's son by a former wife; he insisted, she never was married to his father, but to one *Porter*, whose marriage with her was proved, and a release from him. She upon this sued *Porter* in the spiritual court in a jactitation cause, and obtained sentence against him; and then made that her case in chancery, where it was held to be conclusive evidence. And the opinion was affirmed here upon appeal. *Str.* 961.

And, in the common pleas, M. 11 G. 2. *Prudam* against *Philips*; *Reeve* chief justice held such a sentence conclusive, and would not receive evidence of fraud or collusion in obtaining it. *Str.* 961.

XI. Divorce.

Causes of di-
vorce.

1. By the canon law a divorce is not permitted without sufficient cognizance had of the cause. But by the civil law, divorces were often made thro' heat of anger, when the Romans had a mind to put away their

their wives, by sending them a bill of divorce by one of their freedmen, who was to acquaint the wife with the purpose and intention of her husband. *Ayl. Par.* 225.

Dr Ayliffe says, By the papal canon law there are only five causes of divorce; to wit, adultery, impotency, cruelty, infidelity, and entring into religion. *Ayl. Par.* 226. — Unto which ought to have been added, consanguinity.

2. There be two kinds of divorces: the one that dissolveth the marriage, *Two kinds of a vinculo matrimonii*, as for consanguinity; and the other *a mensa et thoro*, divorce. as for adultery, because that divorce by reason of adultery cannot dissolve the marriage *a vinculo matrimonii*, for that the offence is after the just and lawful marriage. *3 Inst.* 88.

3. Causes for separation *a vinculo*, are consanguinity or affinity within *A vinculo* the degrees prohibited, also impuberty or frigidity; where the marriage it self was merely void *ab initio*, and the sentence of divorce only declaratory of its being so. Insomuch that in debt upon an obligation, tho' the defendant pleaded that at the time of the bond she was wife to a person there named; yet the plaintiff shewing that a former wife was alive at the time of his marrying the defendant, and that thereupon her marriage with him had been adjudged null and void in the spiritual court, judgment was given against her, because the marriage being merely void, she was always sole: And it was further said, that in such case the divorce was only declaratory, and there needed not any such sentence. *Cro. El.* 857. *Gibf.* 446.

The effects of that original voidance and nullity are, that the wife is barred of dower, and the issue are illegitimate; and that the persons so divorced may marry any others. *Gibf.* 446.

Concerning divorce *a vinculo* in case of *impuberty*, or the male or female's marrying under the marriageable years, that is, the first under fourteen, or the second under twelve; the books of common law do confirm and ratify this nullity; not only by declaring, that in case of such divorce, the woman may have an assize for the land given in frank marriage, but also in affirming further, that tho' the man hath issue by such marriage, and is divorced, and marries again and hath issue, and dies, the issue of the second wife shall be his lawful heir; nor will any averment of consenting and living together after the marriageable years be received or admitted in the temporal court, after a divorce in the spiritual court made upon the original nullity, and unrepealed. *Gibf.* 446.

In like manner, do the books of common law resolve, in case of divorce *a vinculo* for *frigidity*, after three years trial, and examination, and sentence in the spiritual court, for the perpetual impotency of generation. As it was in *Bury's* case, *M.* 40 & 41 *El.* who was so divorced, but afterwards married another wife, and had children by her: Upon which it was urged, that the church being evidently deceived as to his perpetual impotency, the divorce thereupon was null; and if so, that the second marriage was unlawful, and the issue illegitimate. But the court resolved, that since there had been a divorce for frigidity or impotency, it was clear that

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that each of them might lawfully marry again; and tho' it should be allowed, that the church appearing to have been deceived in the foundation of their sentence, the second marriage was voidable, yet till it should be dissolved, it remained a marriage, and the issue during the coverture lawful. *Gibf.* 446.

But tho' a sentence of divorce, given in the spiritual court, may be repealed after the death of the parties; yet if any of the parties be dead, before such sentence given, suit cannot be in the spiritual court to declare the marriage void, and bastardize the issue; the marriage being already dissolved by death, and the trial whether legitimate or not, in order to inheritance, originally belongeth to the king's court; and the sentence in the spiritual court being given only *pro salute animæ*, it comes too late. *Gibf.* 446. *Viner.* Bast. G. 4.

*A thoro et
mensa.*

4. Divorce *a thoro et mensa* is, when the use of matrimony, as the cohabitation of the married persons, or their mutual conversation, is prohibited for a time, or without limitation of time. And this is, in cases of adultery, cruelty, or the like; in which the marriage having been originally good, is not dissolved, nor affected as to the vinculum or bond. And this is so by the common as well as by the canon law; insomuch that the wife so divorced, having sued for a legacy left to her, and the husband having given a release, such release hath been adjudged good, notwithstanding the divorce. Nor doth this kind either bar the wife of her dower, or bastardize the children; but intitles her to alimony, which the ecclesiastical court assigns, in proportion to the circumstances and condition of her husband; and no prohibition will lie. But as to the having again the goods she brought, or so much as is not spent; that, in the law books, is meant only of divorce *a vinculo*, or when there was a nullity of marriage ab initio, so as to be really no marriage. *Gibf.* 535.

But the children which she hath after the divorce, shall be deemed bastards; for a due obedience to the sentence will be intended, unless the contrary be shewed. 1 *Salk.* 123.

By *Can.* 107. In all sentences pronounced only for divorce and separation *a thoro et mensa*, there shall be a caution and restraint inserted in the act of the said sentence, that the parties so separated shall live chastly and continently; neither shall they, during each other's life, contract matrimony with other person. And for the better observation of this last clause, the said sentences of divorce shall not be pronounced, until the party or parties requiring the same, have given good and sufficient caution and security into the court, that they will not any way break or transgress the said restraint or prohibition.

And this doctrine, that neither of the parties shall contract matrimony during each other's life, hath been confirmed by the temporal judges in the case of *Foliambe*, who having been divorced from his wife for incontinency on her part, married again during her life; and the second marriage was declared to be void, because it was only a divorce *a thoro et mensa*. And the same is the doctrine of the canon law; and of the same tenor are the ancient constitutions of the english church. Nevertheless
divers

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divers acts of parliament, for the divorce of particular persons in the case of adultery, agreeably to what the *Reformatio legum* did propose in general, have allowed a liberty to the innocent person of marrying again. *Gibf.* 446. *Mo.* 683.

And by *Can.* 108. If any judge, giving sentence of divorce or separation, shall not fully keep and observe the premises; he shall be, by the archbishop of the province, or by the bishop of the diocese, suspended from the exercise of his office for the space of a whole year; and the sentence of separation so given, contrary to the form aforesaid, shall be held void to all intents and purposes of the law, as if it had not at all been given or pronounced.

A divorce for *adultery*, was anciently *a vinculo matrimonii*; and therefore in the beginning of the reign of queen Elizabeth, the opinion of the church of England was, that after a divorce for adultery, the parties might marry again: but in *Foliambe's* case aforesaid, *H.* 44 *El.* in the star chamber, that opinion was changed; and archbishop Bancroft, by the advice of divines, held that adultery was only a cause of divorce *a mensa et thoro.* 3 *Salk.* 138.

5. *Can.* 105. Forasmuch as matrimonial causes have been always reckoned and reputed amongst the weightiest, and therefore require the greater caution when they come to be handled and debated in judgment, especially in causes wherein matrimony, having been in the church duly solemnized, is required upon any suggestion or pretext whatsoever to be dissolved or annulled; we do straitly charge and injoin, that in all proceedings to divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as is possible) be sifted out by the deposition of witnesses and other lawful proofs and evictions, and that credit be not given to the sole confession of the parties themselves, howsoever taken upon oath, either within or without the court.

Divorce not to be on confession of the parties.

The rule of the canon law upon this head, is in a decretal epistle of pope *Celestine* the third, who injoineth; that the parties be not separated by their own confession only, or by the rumour of the neighbourhood: For if they did believe that the ecclesiastical judge would concur with them, some persons would collude together, and confess incest, for the avoiding of their marriage: And the rumour of the neighbourhood ought not so far to be judged valid, as to disannul marriages; unless other reasonable and probable evidences do concur. *Gibf.* 445.

This prohibition against accepting the sole confession of the parties, was expressly renewed in the canons of 1597. And how great need there was of such a prohibition, will appear to any one who shall consult the ancient acts of courts before those times, and shall see there how common it was to pronounce separations upon the sole confession of the parties, and how numerous the separations were, so long as that continued to be the rule. *Gibf.* *Id.*

In 2 *Mod.* 314. there is a remarkable instance of this kind; wherein a prohibition was prayed in behalf of the children, who were in danger to be bastardized by such a fraud. *Collet* married *Mary*, and had children by

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her ; against whom it was libelled in the spiritual court, that he had before married *Anne* the sister of *Mary* : He and *Anne* appear, and confess the matter ; upon which (as the report sets forth) a sentence of divorce was to pass. Whereas in truth, *Collet* was never married to *Anne*, but it was a contrivance between him and his wife to get themselves divorced, after they had lived together sixteen years. *Gibf.* 445.

And sometimes women were suborned to personate the wife, who were to come and confess the adultery ; and so the real wife might be divorced, whilst she knew nothing at all of the matter. And Mr Clerke says, he knew two instances in his time, where supposititious women (not the wives of the parties) were suborned to come and confess the adultery, as if they had been the real and true wives. *1 Ought.* 316.

What shall be
deemed a
compensation
of the crime.

6. If the party accused shall prove, that the accuser hath also committed adultery ; this is a compensation for the crime, and the accuser shall not prevail in his suit. *1 Ought.* 317.

In like manner, if the party accused shall prove, that the accuser before the commencement of the suit had probable knowledge of the crime committed, and yet afterwards had carnal intercourse with the accused ; in such case, the accuser shall not obtain a sentence of divorce : for the crime shall be supposed to have been remitted. *1 Ought.* 317.

And probable knowledge in this case is, if the husband, suspecting his wife, shall charge her with the offence, and she confess it : Or if the witnesses, whom he shall afterwards produce, shall signify to him before the commencement of the suit, that they can testify of the offence from their own sight and knowledge : Or if the husband shall take her in the act of adultery : In all which cases, nevertheless, if the husband shall afterwards have carnal knowledge of his wife, he remitteth the injury, and shall not have a divorce. Therefore if he desires to be divorced, he must abstain from her bed, altho' he doth not presently turn her out of doors. *1 Ought.* 317.

Sentence of
divorce.

7. *Can.* 106. No sentence shall be given either for separation *a thoro et mensa*, or for annulling of pretended matrimony, but in open court, and in the seat of justice, and that with the knowledge and consent either of the archbishop within his province, or of the bishop within his diocese, or of the dean of the arches, the judge of the audience of Canterbury, or of the vicars general, or other principal officials, or sede vacante of the guardians of the spiritualties, or other ordinaries to whom of right it appertaineth, in their several jurisdictions and courts, and concerning them only that are then dwelling under their jurisdictions.

Costs.

8. *M.* 1 *Car.* *Green's* case. *Green* prayed a prohibition to the ecclesiastical court at Salisbury, because his wife sued him there to be separated from him, *propter sevitiam*. And sentence was there given for the husband against the wife ; and he was enforced to pay all the costs for his wife. And afterwards she appealed ; and because the husband would not answer the appeal against himself, and pay for the transmitting of the record, he was therefore excommunicated ; and now prayed a prohibition. The court conceived the case to be very hard, that he should be

be enforced to spend his money against himself. But because it was alledged, that the cause was so in the spiritual court, they would advise until the next term; and ordered to stay their proceedings in the mean time. *Cro. Car.* 16.

XII. Alimony.

1. The ordinary hath the proper cognizance of alimony, and no other Alimony of court: It is true, there lies an appeal, but still it is to the ecclesiastical judge; and if the person condemned will not obey the sentence of that judge, he may be excommunicated. *Ayl. Par.* 59.

In the case of *Angier and Angier*, T. 1718: The wife by her next friend brought a bill against her husband, for a special execution of articles, whereby he had agreed with a friend of hers to allow her 52l a year separate maintenance. Great misbehaviour to each other was proved in the cause. And it was proved by him, that she had libelled in the spiritual court for alimony; and when that cause was depending there, these articles were made; and that he was desirous to be reconciled to her, and therefore stopped the allowance: It was objected, that this would be decreeing a separation; which belongs to the spiritual court: Alimony continues only till the parties are reconciled; and if the articles should be decreed, a future reconciliation could not set them aside. But the lord chancellor decreed an execution. He said it was no invasion upon the spiritual court; and if not decreed here, they can be of no force any where; for the spiritual court cannot decree a performance of them. If the husband make a separate provision for her, he is not at law chargeable with her debts. And he ordered the master to settle an indemnity for him against her debts; and decreed the arrears: and said, it was not a decree for alimony or separation; for when they came together again, the articles would be no longer binding. *Prec. Cha.* 496.

2. A wife cannot sue for alimony, during the cohabitation. *Vin. Ba-* To be only
ron and Feme. X. a. while the par-
ties live sepa-
rate.

And altho' they be separated, yet if the husband maintains the wife, it bars her claim in respect thereof. *id.*

Also if she elopes from her husband, the law will not compel the husband to allow her alimony. *Ayl. Par.* 58.

3. A wife having separate allowance, and being separated, may make a gift of what she saves, as a feme sole. *Vin. ibid.* Wife may dis-
pose thereof.

And in the case of *Dutton and Dutton*, T. 1 G. Lord chancellor Cowper allowed the wife to keep the plate which she had bought, or had been given to her, during the separation. *id.*

So if she sue for defamation or other injury, and has costs, and the husband releases them, this shall not bar the wife; for these costs come in lieu of what she hath spent out of her alimony, which is a separate maintenance, and not in the power of her husband. 1 *Salk.* 115.

XIII. Elopement.

Wife living
with the hus-
band.

1. *E. 3 An. Robinson and Greinold.* By *Holt* chief justice: Tho' the wife be ever so lewd, yet while she cohabits with her husband, he is bound to find her necessaries, and to pay for them; for he took her for better for worse: So if he runs away from her, or turns her away. But if she goes away from him; when such separation becomes notorious, whoever gives her credit, doth it at his peril: for the husband is not liable, unless he takes her again; for then it is as if a woman had eloped at common law, she thereby lost her dower; but if she came again, and the husband received her, the right of dower is revived. 1 *Salk.* 119.

Separating by
consent.

2. *M. 8 W. Todd and Stokes.* The plaintiff was an apothecary, and served the defendant's wife with physick, who lived separate from her husband, and had a separate allowance of 20l a year. And by *Holt* chief justice: If husband and wife separate by consent, and she hath a separate allowance; it is unreasonable she should have it still in her power to charge him; and it is not to be presumed, but tradesmen that deal with her trust her on her own credit, and not on the credit of her husband; and a personal notice is not necessary, it is sufficient that it be publickly and commonly known. 1 *Salk.* 116. *L. Raym* 444.

Turned away.

3. *H. 10 W. Longworthby and Hockmore.* It was ruled by *Holt* chief justice, that if a husband turn away his wife, and afterwards she takes up necessaries upon credit of a tradesman; the husband shall be liable to the tradesman, to pay for them. But if the wife elopes, tho' the tradesman hath no notice of the elopement, if he gives credit to the wife, the husband is not liable. If the wife tells her husband that she will buy such a thing, which is necessary, and the husband tells her that he will not allow it, and forbids the tradesman to give his wife credit for it, and afterwards the wife takes up that thing of the same tradesman, upon credit given her by him; the husband is not liable. It is sufficient for the husband to give general notice, that people do not give credit to his wife. *L. Raym.* 444.

E. 2 An. Eiberington and Parrot. By *Holt* chief justice: If a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessaries for her. But if she runs away from her husband, he shall not be bound by any contract she makes. On the other side, while they cohabit, the husband shall answer all contracts of hers for necessaries; for his assent shall be presumed to all necessary contracts, upon the account of cohabiting, unless the contrary appear. But if the contrary appear, as by notice, there is then no room for such a presumption. 1 *Salk.* 118.

M. 18 G. 2. Bolton and Prentice. In *assumpsit* for goods sold and delivered to the defendant's wife, the case appeared to be, that the defendant and his wife had formerly lodged at the plaintiff's house, and the plaintiff furnished her with goods; and the defendant finding the plaintiff had

had helped her to pawn her watch, and suspecting he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever to trust her again. After this, the defendant and his wife cohabited together for a year; when, without any cause appearing, he left her, locked up her cloaths, and upon her finding him out, refused to admit her, and struck her, and declared he would not maintain her, or pay any body that did. In this distress, she borrowed cloaths of her friends, and applied to the plaintiff, who furnished her with necessaries according to the defendant's degree; which the defendant refusing to pay for, this action was brought: and upon trial the jury found for the plaintiff. Upon motion for a new trial, the court held the verdict was right; for whilst they were at the plaintiff's, there was a particular reason for the particular prohibition; yet the causeless turning her away destitute afterwards, gave her the general credit again: and if a husband should be allowed, under the notion of a particular prohibition, to destroy her obtaining credit in one place, he may in the same manner prevent it with all people she is acquainted with. He appears to be a wrong doer, and therefore has no right to prohibit any body. *Str.* 1214.

4. *T. 4 G. 2. Child and Hardyman.* Action for linen sold to the defendant's wife. Upon *non assumpsit*, the delivery was proved. And the defendant proved that she had lived in a very lewd manner; one Mr. *Nott* frequently coming to her at her husband's house, and they were locked up together in a bed-chamber; and other indecencies passed between them. And it was also proved, that she several times went to the house of this *Nott*, a gentleman in *Wiltshire*, who lived within three miles of the defendant's house. It did not appear farther, than that he disliked her going and staying at Mr. *Nott*'s. But under these circumstances, the husband and wife continued to live together. Afterwards, she went away from him, and went to *Marlborough*, where she resided for some time; but after the leaving her husband's house, it did not appear that she ever saw Mr. *Nott*, or lived in a lewd manner. After some time, she sent *Lucas* an attorney to her husband, to desire that he would receive her again; the husband told him, that if she came again, she should never sit at the upper end of his table, nor have the government of the children; but should live in a garret. Then *Lucas* proposed to him, to make her an allowance, and proposed about 80 or 100l a year, he being worth about 5 or 600l a year. But that was not complied with; and afterwards she came to *London*, and bought the linen to the amount of 53l. By *Raymond* chief justice: If a woman elopes from her husband, tho' she does not go away with an adulterer, or in an adulterous manner; the tradesman trusts her at his peril, and the husband is not bound. And this hath been so adjudged in two or three cases. Indeed if he refuse to receive her again, from that time it may be an answer to the elopement. In this case he doth not absolutely refuse to receive her again; but that she should neither sit at his table, nor have any government of the children, but should be kept in a garret; and she deserved no better usage. And the plaintiff was nonsuit. *Str.* 875.

5. By

Living with
an adulterer.

5. By the 13 Ed. 1. st. 1. c. 34. *If a wife willingly leave her husband, and go away, and continue with her advouterer, she shall be barred for ever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon; except that her husband willingly, and without coercion of the church, reconcile her and suffer her to dwell with him; in which case, she shall be restored to her action.*

Willingly leave her husband, and go away, and continue] Albeit the words of this branch be in the conjunctive, yet if the woman be taken away not willingly but against her will, and afterwards consent, and remain with the adulterer without being reconciled, she shall lose her dower; for the cause of the bar of her dower is not the manner of the going away, but the remaining with the adulterer in avowtry without reconciliation that is the bar of the dower. 2 *Inst.* 435.

And continue with her advouterer] Albeit she do not continually remain in avowtry with the adulterer, yet if she be with him and commit adultery, it is a tarrying within this statute. 2 *Inst.* 435.

And if she once remain with the adulterer in avowtry, and afterwards he keepeth her against her will; or if the avowterer turn her away, yet she shall be said to continue with the advouterer within this statute. 2 *Inst.* 435.

To demand her dower] In this case of elopement, and remaining with the adulterer, the wife could not be barred of her dower by the common law, altho' a divorce were sued or had for the same adultery: but by a divorce *a vinculo*, in the life time of her husband, she loseth her dower by the common law. 1 *Inst.* 33.

M. 12 G. Morris and Martin. Action for meat and other things provided for the defendant's wife. The defendant proved she went away from him with an adulterer. *Raymond* chief justice held, that the husband should not be charged for necessaries for her, tho' the plaintiff who provided for her had no notice; and he said, chief justice *Holt* always ruled it so. *Str.* 647.

T. 12 G. Mainwaring and Sands. In an action against the husband for a laced head sold to the wife, it was proved, that the wife lived from her husband in adultery, and that she told the plaintiff she had a husband, but that signified nothing, for she would pay him her self. *Raymond* chief justice held the defendant not chargeable, and said he should have ruled it so, if there had been no actual notice, which only strengthened the case. *Str.* 706.

Prohibition.

6. *H. 12 J. Hyat's case.* *Thomas Hyat* prayed a prohibition to the consistory court of London, for that he was sued there by his wife to be separated from him *propter sevitiam*; and sentence was there given against him, that his wife should live from him, and that he should allow her 5s 6d weekly, altho' the husband offered reconciliation, and desired cohabitation, and proffered caution to use her fitly. But it was denied by the court to grant a prohibition; because the court of the ordinary is the

Marriage.

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proper court for allowance of alimony, and may take order for separation or divorce, if she be cruelly used. *Cro. Ja.* 364.

Martyrdom of king Charles the first. See *Holidays*.

Mast.

MAST is the acorn, nut, or other fruit of the trees of the wood; which is usually fed upon by the swine or other cattle: perhaps from *μασάζω*, to champ or chew; from whence also may proceed the saxon word *mæstan*, to fatten. Which is treated of under the title *Cithes*.

May the twenty ninth. See *Holidays*.

Methodists. See *Dissenters*.

Metropolitan. See *Bishops*.

Midwives.

HERETOFORE, in cases of necessity, the office of baptizing was frequently performed by the midwife; and it is very probable, that this gave occasion first to midwives being licensed by the bishop or his delegated officer. *Watf. c.* 31. 2 *Burnet's Hist. Ref.* 77.

And by several constitutions, the minister was required frequently to instruct the people, in the form of words to be used in such cases of necessity.

In order for a midwife's obtaining a licence, she must be recommended under the hands of matrons who have experienced her skill; and also of the parish minister, certifying as to her life and conversation, and that she is a member of the church of England.

The oath to be administered to a midwife by the bishop or his chancellor, when she is licensed to exercise that office, is as followeth:

“ You shall swear, first, that you shall be diligent and faithful and ready to help every woman labouring of child, as well the poor as the rich; and that in time of necessity, you shall not forsake the poor woman to go to the rich.

“ Item,

Midwives.

“ Item, You shall neither cause nor suffer any woman to name or put any other father to the child, but only him which is the very true father thereof indeed.

“ Item, You shall not suffer any woman to pretend, feign, or surmise her self to be delivered of a child, who is not indeed; neither to claim any other woman’s child for her own.

“ Item, You shall not suffer any woman’s child to be murdered, maimed, or otherwise hurt, as much as you may: and so often as you shall perceive any peril or jeopardy either in the woman, or in the child, in any such wise as you shall be in doubt what shall chance thereof; you shall thenceforth in due time send for other midwives and expert women in that faculty, and use their advice and counsel in that behalf.

“ Item, You shall not in any wise use or exercise any manner of witchcraft, charm, or sorcery, invocation, or other prayers, than may stand with god’s laws and the king’s.

“ Item, You shall not give any counsel, or minister any herb, medicine, or potion, or any other thing, to any woman being with child, whereby she should destroy or cast out that she goeth withal before her time.

“ Item, You shall not enforce any woman being with child, by any pain or by any ungodly ways or means, to give you any more for your pains or labour in bringing her to bed, than they would otherwise do.

“ Item, You shall not consent, agree, give or keep counsel, that any woman be delivered secretly of that which she goeth with, but in the presence of two or three lights ready.

“ Item, You shall be secret, and not open any matter appertaining to your office, in the presence of any man; unless necessity, or great urgent cause do constrain you so to do.

“ Item, If any child be dead born, you your self shall see it buried in such secret place, as neither hog or dog nor any other beast may come unto it; and in such sort done, as it be not found nor perceived, as much as you may: and that you shall not suffer any such child to be cast into the jaques or any other inconvenient place.”

“ Item, If you shall know any midwife using or doing any thing contrary to any of the premises, or in any otherwise than shall be seemly or convenient; you shall forthwith detect, open, or shew the same to me or my chancellor for the time being.

“ Item, You shall use your self in honest behaviour unto the woman, being lawfully admitted to the room and office of a midwife, in all things accordingly.

“ Item, That you shall truly present to my self, or my chancellor, all such women as you shall know from time to time to occupy and exercise the room of a midwife within my foresaid diocese and jurisdiction of ——— without any licence and admission.

“ Item,

Midwives.

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“ Item, You shall not make or assign any deputy or deputies, to exercise or occupy under you in your absence the office or room of a midwife, but such as you shall perfectly know to be of right honest, and discreet behaviour; and also apt, able, and having sufficient knowledge and experience to exercise the said room and office.

“ Item, You shall not be privy, or consent, that any priest or other party shall in your absence, or in your company, or of your knowledge or sufferance, baptize any child by any mass, latin service, or prayers, than such as are appointed by the laws of the church of England; neither shall you consent, that any child born by any woman who shall be delivered by you, shall be carried away without being baptized in the parish by the ordinary minister where the said child is born, unless it be in case of necessity baptized privately according to the book of common prayer: but you shall forthwith, upon understanding thereof, either give knowledge to me the said bishop, or my chancellor for the time being.

“ All which articles and charge you shall faithfully observe and keep: So help you god, and by the contents of this book.” *Book of oaths.*

If there be a suit in the spiritual court, against a woman for exercising the trade of a midwife without licence of the ordinary, against the canons; a prohibition lieth: for this is not any spiritual function, of which they have cognifance. *2 Roll's Abr. 286.*

Mines in the glebe land. See Glebe land.

Monasteries.

NOTE, the principal parts of this title are taken from that most accurate and valuable work, bishop Tanner's *Notitia Monastica*.

- I. *Origin of monasteries.*
- II. *The several orders of monks.*
- III. *Canons.*
- IV. *Nuns.*
- V. *Friers.*
- VI. *Military orders.*
- VII. *Of the several kinds of houses.*
- VIII. *Officers therein.*
- IX. *Dissolution.*
- X. *Observations.*

VOL. II.

H

I. Ori-

Monasteries.

I. Origin of monasteries.

The original of *monks* (from the word *monos*, solus,) seemeth to have been this: The persecutions, which attended the first ages of the gospel, forced some christians to retire from the world, and live in desarts and places most private and unfrequented, in hopes to find that peace and comfort among beasts, which were denied them amongst men. And this being the case of some very extraordinary persons, their example gave so much reputation to retirement, that the practice was continued when the reason ceased which first began it. And after the empire became christian, instances of this kind were numerous; and those, whose security had obliged them to live separately and apart, became afterwards united into societies.

And in this kingdom in particular, it is not unlikely, but that several christians, to avoid the heat of persecution, which raged fiercely here in the time of Dioclesian, about the year 303, might withdraw themselves into solitary places. The troublesome times which soon after followed, by the Romans hard usage of the Britons, and the invasions of the Scots from Ireland, the Picts and Attacots from the north, and the Saxons and Franks from the east and south, might possibly farther incline contemplative persons to flee into caves, forests, and such like solitudes, and spend their time there in reading the scriptures, and other duties of religion, tho' under no tie or vow but what they imposed upon themselves.

II. The several sorts of monks.

Benedictines.

1. The *Benedictine* monks were those who followed the rule of St *Benedict*, or *Bennet*; who was born at Nursia in the dukedom of Spoleto in Italy, about the year 480. From the colour of their outward habit, they were generally called Black monks. This order is said to have been brought into England, about the year 596. Of this order were all the cathedral priories, except Carlisle; and most of the richest abbies in England. There were also nuns, as well as monks, of this order.

Cluniacks.

* 2. A reformation of some things which seemed too remiss in St *Benedict*'s rule, was begun by Bernon, abbot of Gigni in Burgundy, and increased and perfected by Odo abbot of *Cluni*, about the year 912; which gave occasion to the rise of the *Cluniack* order; which was the first and principal branch of the Benedictines. For they lived under the rule of St *Benedict*, and wore a black habit; but observing a different discipline, were called by a different name.

William earl Warren, son in law to William the conqueror, first brought these monks into England, and built their first house at Lewes in Sussex about the year 1077.

All the monasteries of this order in England were governed by foreigners; and had more French than English monks in them. But many of them were afterwards made denizen; and all of them at last discharged from all subjection to the foreign abbies.

Monasteries.

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There were 27 priories and cells of this order in England.

3. The order of *Grandmont* was instituted at *Grandmont* in Limosin Grandmontines. in France about the year 1076, by Stephen a gentleman of Auvergne. The monks of it lived under the rule of St Benedict, with some little variation. They were brought into England in the reign of king Henry the first, and seated at Abberbury in Shropshire; besides which, it doth not appear that there were more than two other houses of this order in England, viz. Cresswel in Herefordshire, and Grosmont or Eskedale in Yorkshire.

4. The *Carthusian* monks were also a branch of the Benedictines, Carthusians. whose rule they followed, with the addition of a great many austerities. Their author was one Bruno, born at Cologne in Germany; who first instituted this order at *Chartreux* (*Cartusia*) in the diocese of Grenoble in France, about the year 1080.

Their houses were called *Chartreux* houses, which by corruption have degenerated into *Charter* houses.

Their rule was the most strict of any of the religious orders; for they were never to eat flesh, and were obliged to feed on bread, water, and salt one day in every week. They wore a hair shirt next their skins, and were allowed to walk only about their own grounds once a week.

They were brought into England about the year 1180 by king Henry the second; and had their first house at Witham in Somersetshire.

Their habit was all white, except their outward plaited cloak which was black.

There were but nine houses of monks of this order in England.

5. There was yet another branch of Benedictines called *Cisterians*, from Cisterians, or Cistercium, or Cisteaux. in the bishoprick of Chalons in Burgundy, where this order was first instituted by Robert abbot of Moleme in the year 1098. They were also called *Bernardines*, from *St Bernard* abbot of Clairvaux about the year 1116, who was a great promoter of this order.

From the colour of their habit, they were called White monks.

Their monasteries, which became very numerous in a short time, were generally founded in solitary and uncultivated places; and all dedicated to the blessed virgin.

These monks came into England in the year 1128; had their first house at Waverley in Surrey; and before the dissolution had 85 houses here.

6. The order of *Savigni* or *Fratres Grisei* were founded by Vitalis de Savignians, or fratres grisei. Mortain, who began to gather disciples in the forest of *Savigni* in France about the year 1105. He gave his disciples the rule of St Benedict, with some peculiar constitutions: And they took a grey habit, from whence they were called *fratres grisei*. Vitalis came into England in the year 1120; and preaching here, and converting many, probably introduced his order, which was shortly after, (viz. in the year 1148) united to the Cisterians.

7. The order of *Tiron* was instituted by St Bernard, who was born Tironenses. in the territory of Abbeville in the year 1046, who set up a sort of monks

that took the name of *Tironenses* from their first monastery, which was founded at *Tiron* about the year 1109. They were reformed Benedictines. There seems to have been no house in England of this order, and only one abbey in Wales, viz. St. Dogmael's (where they were placed about the year 1126), with its dependent priory at Pille, and cell at Caldey.

Culdees.

8. The orders of monks abovementioned, were all that we had in England and Wales, except the *Culdees* or *cultores dei*; who were Scotch monks, and of the same rule with the Irish ones. We meet with these no where but at St Peter's in York.

And the institution of Scotch monks there, seemeth to have arisen from the connection which was anciently between the metropolitical see of York and the kingdom of Scotland; for until about the year 1466, the archbishop of York had jurisdiction over all the bishops of Scotland, who had their consecration from him, and swore canonical obedience to him.

III. Canons.

Secular.

1. Besides the monks, there were also *canons* (from *κανων*, regula), which were of two sorts, regular and secular. The *secular* were so called because they conversed *in seculo*, abroad in the world, performed spiritual offices to the laity, took upon them the cure of souls (which the regulars could not do without dispensation), and differed in nothing almost from common priests, save that they were under the government of some local statutes. For tho' they were in some places confined to live under one roof, as the monks and regular canons did, yet they generally lived apart, and were maintained by distinct prebends, almost in the same manner with the canons and prebendaries of other cathedral and collegiate churches at this day.

Regular.

2. *Regular* canons were such as lived under some rule. They were a less strict sort of religious than the monks, but lived together under one roof; had a common dormitory and refectory, and were obliged to observe the statutes of their order.

Augustines.

3. The chief rule for these canons is that of *St Austin*, who was made bishop of Hippo in the year 395. But they were but little known till the tenth or eleventh century, were not brought into England till after the conquest, and seem not to have obtained the name of Austin canons till some years after. The general opinion is, that they came in after the beginning of the reign of king Henry the first, about the year 1105.

Their habit was a long black cassock, with a white rochet over it, and over that a black cloak and hood; from whence they were called black canons regular of St Austin.

The monks were always shaved; but these canons wore beards, and caps on their heads.

There were about 175 houses of these canons and canoneesses in England and Wales.

4. But

4. But besides the common and regular sort of these canons, there were also the following particular sorts. Order of St Nicholas.

As first, such as observed St Austin's rule, according to the regulations of *St Nicholas of Arrouais*; as those of Harewolde in Bedfordshire, Nutley or Crendon in Buckinghamshire, Hertland in Devonshire, Brunne in Lincolnshire, and Lillehul in Shropshire.

5. Others there were of the rule of St Austin, and order of *St Victor*; Order of St Victor. as at Keynsham and Worpspring in Somersetshire, and Wormesley in Herefordshire.

6. Others, of the order of St Austin, and the institution of *St Mary of Meretune*, or *Merton*; as at Buckenham in Norfolk. Of St Mary of Merton.

7. The *Præmonstratenses* were canons who lived according to the rule of St Austin, reformed by St Norbert, who set up this regulation about the year 1120, at *Præmonstratum* in Picardy, a place so called because it was said to have been foretold or *præmonstrated* by the blessed virgin to be the head seat and mother church of this order. These canons were, from their habit, called White canons. They were brought into England soon after the year 1140, and settled first at Newhouse in Lincolnshire. They had in England a conservator of their privileges, but were nevertheless often visited by their superiors at Premonstre, and continued under their jurisdiction till the year 1512, when they were exempted from it by the bull of pope Julius the 2d, confirmed by king Henry the eighth; and the superiority of all the houses of this order in England and Wales was given to the abbot of Welbeck in Nottinghamshire.—There were about 35 houses of this order.

8. The Sempringham or *Gilbertine* canons were instituted by *St Gilbert* at Sempringham in Lincolnshire, in the year 1148. He composed his rule out of those of St Austin and St Benedict (the women following the Cistercian regulation of St Benedict's rule, and the men the rule of St Austin), with some special statutes of their own. The men and women lived in the same houses, but in such different apartments that they had no communication with each other; and increased so fast, that St Gilbert himself founded 13 monasteries of this order, viz. four for men alone, and nine for men and women together, which had in them 700 brethren and 1500 sisters. At the dissolution there were about 25 houses of this order in England and Wales.

9. Canons regular of the *holy sepulchre* were instituted in the beginning of the 12th century, in imitation of the regulars instituted in the church of the holy sepulchre of our saviour at Jerusalem. The first house they had in England was at Warwick, which was begun for them by Henry de Newburgh earl of Warwick, who died in the year 1123, and perfected by his son Roger. They are sometimes called canons of the *holy cross*, and wore the same habit with the other Austin canons, distinguished only by a double red cross, upon the breast of their cloak or upper garment. The endeavours of these religious for regaining the holy land, coming to nothing after the loss of Jerusalem in the year 1188, this order fell into decay, their revenues and privileges were mostly given Order of the holy sepulchre, or holy cross.

to the Maturine friers, and only two houses of them continued to the dissolution.

IV. Nuns.

Nun, called by the latins *nonna*; as also the masculine *nonnus*, which they used to signify a monk; are of hebrew extraction, from *nin*, or *nun*, a *son*.

Several sorts
of nuns.

1. There were, besides the Benedictine and Gilbertine nuns before mentioned, Cluniac, Cistercian, Carthusian, Austin, and Præmonstratensian nuns, who followed the same rules with their respective monks, omitting only what was not proper for their sex, and wore habits of the same colour, having their heads always covered with a veil.

Order of
Fontevrault.

2. And to these we must add three other orders of religious women, formerly in England; viz.

First, nuns of the order of *Fontevrault*, which was instituted about the latter end of the eleventh century, by one Robert surnamed de Arbrissel at *Fontevrault* in Poictiers, where he built an abbey for his followers presently after the year 1100. Tho' this order (which was a reform of the Benedictine) was chiefly for women, yet beyond sea they had also religious men living amongst them in different apartments, who were under the government of the abbesses; for the founder grounded his model upon our blessed saviour's recommending the virgin Mary and St John the evangelist to each other. And as St John was thereby to look upon the blessed virgin as his mother, the founder directed that the men should acknowledge the abbesses or prioresses of the convent as their superior, and submit to her authority both in spirituals and temporals. And the abbesses of *Fontevrault* was made the general superiresses and head of the order. — These nuns were brought into England by Robert Bosu earl of Leicester, before the year 1161, and placed at Nun Eaton in Warwickshire; but there were only two houses more of this order in England, and there is no express account of any monk in any of them, but only of a prior at Nun Eaton.

Order of St
Clare, or mi-
noresses.

3. The nuns of *St Clare* were founded by her whose name they bear, at Assise in Italy, about the year 1212. These nuns observing St Francis's rule, and wearing the same coloured habit with the Franciscan friers, were often called *minoresses*; and their house, without Aldgate, the *minories*. They were likewise called the *Poor Clares*, probably from their scanty endowments. They were brought into England by Blanch queen of Navarre, who was wife to Edmund earl of Lancaster Leicester and Derby, about the year 1293, and seated without Aldgate as aforesaid. Besides which, there were but three houses more of this order in England, viz. Waterbeache and Denny in Cambridgeshire, and Brusyard in Suffolk.

Order of St
Bridget.

4. The *Brigittines*, or nuns of our holy saviour, were instituted by *St Bridget*, princess or duchess of Nericia in Sweden, about the middle of the 14th century, under the rule of St Austin, with some additions of her own. This order, tho' chiefly for women, had likewise men in every convent

convent (who lived in different apartments, and were not permitted to come near the women but in cases of great necessity), and differed from all other institutions in requiring a particular number of men and women in every house, to wit, 60 nuns, 13 priests, 4 deacons, and 8 lay brethren. There seems to have been only one house of this order in England, namely, at Syon in Middlesex, founded by king Henry the fifth, about the year 1414.

V. Friers.

The before mentioned were all the sorts of monks, canons, and nuns, which we had in England and Wales: The *friers* (*fratres*, brethren) were these following:

1. The *Dominicans*; whose founder was St *Dominic* a Spaniard, who was born about the year 1070. They were called *preaching friers*, from their office to preach and convert hereticks; *black friers*, from their garments; and in France, *Jacobines*, from having their first house in St James's street at Paris. Their rule was chiefly that of St Austin. They came into England in the year 1221, had their first house at Oxford, and at the dissolution had about 43 houses in England.—There were nuns also of this order, but not in England.

2. The *Franciscans* received their rule from St *Francis* an Italian, in the year 1182. They were also called *Grey* or *Minor Friers*, the one from their grey cloathing, the other name they assumed out of pretended humility. They girded themselves with cords, and went barefooted. The general opinion is, that they came into England in the year 1224, and had their first house at Canterbury, and their second at London.—A relaxation having by degrees crept into this order, it was thought fit to reform and reduce it to its first rule and institution. Those that continued under the relaxation were called *Conventuals*; and such as accepted the reformation of their order were called *Observants* or *Recollects*. This reformation was begun by St *Bernard* or *Bernardin*, about the year 1400.—King Edward the 4th is commonly said to have brought them into England, but there is no certain account of their being here, till king Henry the 7th built two or three houses for them. At the dissolution, the conventual Franciscans had about 55 houses, which were under 7 custodies or wardenships; viz. those of London, York, Cambridge, Bristol, Oxford, Newcastle, and Worcester.

3. As to the *Capuchins*, and other distinctions of the Franciscans beyond the seas; they chiefly arose since the English reformation, and never had any place here.

4. The *Trinitarians*, *Maturines*, or friers of the order of the *holy trinity*, for the redemption of captives, were instituted by St John de *Matka*, and Felix de Valois in France, about the year 1197. Their rule was that of St Austin, with some peculiar constitutions. Their revenues were to be divided into three parts, one for their own support and maintenance, another to relieve the poor, and a third to redeem such christians as should be taken captives by the infidels. They were called *Trinita-*

Trinitarians, because all their churches were to be dedicated to the *holy trinity*; and *Maturines*, from having their first house in Paris near *St Mathurine's* chapel. They were brought into England in the year 1224; where the lands, revenues, and privileges of the canons of the holy sepulchre were given to them upon the decay of that order; and had their first house at Mottenden in Kent. There were about 10 or 12 houses of these friers in England and Wales.

Carmelites.

5. The *Carmelite* or *White friers* (the former of which names they had from the place of their first residence, and the latter from the colour of their habit) came next into this kingdom. They were also called brethren or friers of the *blest virgin*. They pretended to great antiquity, but the first certain account we have of them is at mount *Carmel* in Palestine, about the year 1238. Their rule (which was chiefly that of *St Basil*, is said to have been given them by *Albert* patriarch of Jerusalem about the year 1205. They were brought into England in the year 1240, by the lords *John Vesey* and *Richard Grey*, and had their first houses at *Alnewick* in Northumberland, and *Ailesford* in Kent. Of this order there were about 40 houses in England and Wales.

Crossed or crouched friers.

6. The order of *Crossed* or *Crouched* friers were instituted, or at least reformed, by one *Gerard*, prior of *St Mary of Morello* at Bologna; and confirmed in the year 1169 by pope *Alexander the third*, who brought them under *St Austin's* rule, and made some other constitutions for their government. At first they carried a *cross* fixed to a staff in their hands, and afterwards had one made of red cloth sewed upon their backs or breasts. They came into England in the year 1224, and had their first house at *Colchester*. There were not here above 6 or 7 houses of these friers.

Austins or Eremites.

7. The origin of the *Austin* friers, or friers *Eremites* of the order of *St Austin* (from *eremus*, a desert place), is very uncertain. They were brought into England about the year 1250. They had about 32 houses in England and Wales at the suppression.

Order of the Sac.

8. The friers of the *Sac* first appeared in England in the year 1257. The right style of them was *friers of the penance of Jesus Christ*. But they were commonly called friers of the *Sac*, from their habit being either shaped like a *sack*, or made of that coarse cloth called *sackcloth*. They seem to have had their first house near *Aldersgate*, London. But their order was very short lived here, being put down by the council at Lyons in the year 1307.

Bethlemites.

9. The *Bethlemite* friers came in also in the year 1257. They had their rule and habit much like that of the *Dominicans*, but were distinguished from them by a red star of five rays, with a blue circle in the middle of it, worn on their breasts in memory of the star which appeared to the wise men, and conducted them to *Bethlehem*. They were placed in *Trumpington street* at Cambridge the first year they came over. And that seems to have been the only house of these friers in England.

Order of St Anthony of Vienna.

10. The order of *St Anthony of Vienna* was instituted in the year 1095, for the help and relief of such persons as were afflicted with that painful inflammation called *St Anthony's fire*, from that saint's being thought to ease people under it, and deliver them from it. The friers or brethren of

of this order followed St Austin's rule ; came hither early in the reign of king Henry the third, and had one house at London, and another at Hereford.

11. The last order of friers which was brought into this kingdom, was Bonhommes, that of *Bonhommes*, or *good men* ; who were brought hither by Edmund earl of Cornwall, in the year 1283, and placed at Atherug in Bucks. Besides which, there was but one house more of this order in England, to wit, Edington in Wiltshire. These friers followed the rule of St Austin, and wore a blue habit.

VI. Military orders.

Of the *military* orders of the religious, there were these following :

1. *Knights Hospitalars*, who took their name from an *hospital* built at Hospitalars Jerusalem for the use of pilgrims coming to the holy land, and dedicated to St John Baptist. For the first business of these knights was, to provide for such pilgrims at that hospital, and to protect them from injuries and insults upon the road. They were instituted about the year 1092. They followed chiefly St Austin's rule ; and wore a black habit, with a white cross upon it. They soon after came into England, and had an house built for them in London in the year 1100. And from a poor and mean beginning, they obtained so great wealth and honours and exemptions, that their superior here in England was the first lay baron, and had a seat amongst the lords in parliament ; and some of their privileges were extended even to their tenants. They were at first called knights of St John of Jerusalem ; but settling chiefly at Rhodes after they were driven out of the holy land, were afterwards called knights of Rhodes ; and after the loss of Rhodes in the year 1522, and their having the island of Malta given them by the emperor Charles the fifth, they were called knights of Malta.

There were also sisters of this order ; but we had only one house of them in England, viz. Buckland in Somersetshire.

2. The *knights Templars* were instituted in the year 1118 ; and were Templars. so called from having their first residence in some rooms adjoining to the temple at Jerusalem. Their business also was, to guard the roads for the security of pilgrims in the holy land ; and their rule, that of canons regular of St Austin. Their habit was white, with a red cross on their left shoulder. Their coming to England was probably pretty early in the reign of king Stephen ; and their first seat was in Holborne. They increased very fast, and in a little time obtained very large possessions. But in less than 200 years, their wealth and power was thought too great ; they were accused of horrid crimes, and thereupon every where imprisoned ; their estates were seized ; and their order was suppressed by pope Clement the fifth, in a general council at Vienna, in the year 1312.

3. The order of *St Lazarus* of Jerusalem (of which we had a few Order of St houses) seems to have been founded for the relief and support of lepers Lazarus. and impotent persons of the military orders.

VII. *Of the several kinds of houses.*

The above recited are all the religious orders which we had in England and Wales. The houses belonging to the said orders were as follows:

Cathedrals.

1. *Cathedral* is a name yet well known: In the conventual cathedrals, the bishop was in the place of an abbat, and had the principal stall on the right hand of the entrance into the quire; as he hath still at Ely, and till lately had at Durham and Carlisle.

Colleges.

2. *Collegiate* churches and colleges consisted of a number of secular canons, living together under the government of a dean, warden, provost, or master; and having for the more solemn performance of divine service, chaplains, singing men, and choiristers belonging to them.

Abbies.

3. An *abby* was a society of religious people, having an abbat or abbess to preside over them. And some of these were so considerable, that the abbats of them were called to parliament, and had seats and votes in the house of lords. Mr Fuller saith, that in the 49 Hen. 3. sixty four abbats, and 36 priors were called to parliament. But this number being too great, king Edward the first reduced it to 25 abbats and 2 priors, to whom were afterwards added two abbats. So that there were 29 in all, and no more, that stately and constantly enjoyed this privilege; viz. the abbat of Tewkesbury, the prior of Coventry, the abbats of Waltham, Cirencester, St John's at Colchester, Croiland, Shrewsbury, Selby, Bardney, St Bennet's of Hulme, Thorney, Hide, Winchelcomb, Battel, Reading, St Mary's in York, Ramsey, Peterburgh, St Peter's in Gloucester, Glastonbury, St Edmund's Bury, St Austin's in Canterbury, St Alban's, Westminster, Abingdon, Evesham, Malmesbury, and Tavistock; and the prior of St John's of Jerusalem, who was styled the first baron of England, but it was with respect to the lay barons only, for he was the last of the spiritual ones.

Priories.

4. A *priory* was a society of religious, where the chief person was termed a prior or prioress; and of these there were two sorts:

(1) Where the prior was chief governor, as fully as any abbat in his abby, and was chosen by the convent: such were the cathedral priors, and most of the Austin order.

(2) Where the priory was a cell, subordinate to some great abby; and the prior was placed and displaced at the will of the abbat. But there was a considerable difference between some of these cells. For some were altogether subject to their respective abbies, who sent them what officers and monks they pleased, and took their revenues into the common stock of the abbies. But others consisted of a stated number of monks, who had a prior sent them from the abby, and paid a pension yearly as an acknowledgment of their subjection, but acted in other matters as an independent body, and had the rest of the revenues for their own use. These priories or cells were always of the same order with the abbies on whom they depended, tho' sometimes of a different sex; it being usual after the conquest, for the great abbies to build nunneries in some of their

their manors, which should be priories to them, and subject to their visitation.

There were also *priories alien*, which were cells to foreign monasteries. For when manors or tithes were given to foreign monasteries, the monks, either to increase their own rule, or perhaps rather to have faithful stewards of their revenues, built convenient houses for the reception of a small convent, and then sent over such a number as they thought proper, constituting priors over them. And there was the same difference in these cells as in the former. For some of them were conventual, and had priors of their own choosing; and these were intire societies within themselves, and received the revenues belonging to their several houses for their own use and benefit, paying only the ancient apport (*apportum*, perhaps from *porto*, to carry), or what was at first the surpluse, to the foreign house. But others depended wholly upon the foreign houses, their priors were set over them, by the foreign houses, their monks also were often foreigners; and both of them removable at pleasure; and they returned all their revenues to the foreign head houses. For which reason their estates were generally seized during the wars between England and France, and restored to them again upon a return of peace.

These alien priories were most of them made by such as had foreign abbies founded by themselves or by some of their family.

5. *Preceptories* were manors or estates of the knights templars, where Preceptories: erecting churches for the service of god, and convenient houses, they placed some of their fraternity under the government of one of those more eminent templars, who had been by the grand master created *præceptores templi*, to take care of the lands and rents in that place and neighbourhood, and so were only cells to the principal house at London.

6. *Commandries* were the same amongst the knights hospitalars, as pre-Commandries: ceptories were amongst the templars, viz. societies of those knights placed upon some of their estates in the country, under the government of a *commander*; who were allowed proper maintenance out of the revenues under their care, and accounted for the remainder to the grand prior at London.

7. *Hospitals* were such houses for relief of the poor and impotent peo- Hospitals: ple, as were incorporated by royal patents, and made capable of gifts and grants in succession. But besides the poor and impotent, there generally were in these hospitals, two or three religious; one to be master or prior, and one or two to be chaplains and confessors; and these observed the rule of St Austin, and probably subjected the poor and impotent to some religious restraints, as well as to the local statutes. Hospitals were originally designed for the relief and entertainment of travellers upon the road, and particularly of pilgrims, and therefore were generally built by the way side; but of later years they have been always founded for fixed inhabitants.

8. *Frieries* were houses erected for the habitation of friers; they were Frieries: very seldom endowed, yet many of them were large and stately buildings, and had noble churches, in which many great persons chose to be buried.

Monasteries.

Friers were by their profession mendicants, and to have no property; but most of their houses had some shops and gardens belonging to them.

Hermitages. 9. *Hermitages* (from *ερημος*, a desert or solitary place) were religious cells erected in private and solitary places, for single persons or communities, many times endowed, and sometimes annexed to larger religious houses.

Chauntries. 10. *Chauntries* (*cantarie*) were endowments of lands or other revenues, for the maintenance of one or more priests to celebrate daily mass for the souls of the founder and his relations, and of their other benefactors; sometimes at a particular altar, and oftentimes in little chapels added to cathedral and parochial churches for that purpose.

Free chapels. 11. *Free chapels* were places of religious worship, exempt from all jurisdiction of the ordinary, save only, that the incumbents were generally instituted by the bishop, and inducted by the archdeacon of the place. Most of these chapels were built upon the manors and ancient demesnes of the crown, whilst in the king's hands, for the use of himself and retinue when he came to reside there. And when the crown parted with those estates, the chapels went along with them, and retained their first freedom; but some lords having had free chapels in manors that do not appear to have been ancient demesne of the crown, such are thought to have been built and privileged by grants from the crown.

VIII. Officers therein.

Officers in these houses respectively, which we read of, were these.

Abbat. 1. In every abby the chief officer was the *abbat* or *abbess*, who presided in great pomp, was generally called lord abbat or lady abbess, and had a kitchen and other offices distinct from the common ones of the society.

Prior. 2. In every priory, the chief officer was the *prior* or *prioress*, who had the same power in priories as abbats and abbesses had in abbies, but lived in a less splendid and expensive manner, tho' in some of the greater houses they were called lord prior, and lady prioress.

Subabbat and subprior. 3. Next under the abbat in every *abby* was the prior, who in the abbat's absence had the chief care of the house, and under him was the subprior, and in great abbies the third, fourth, and even fifth prior, who had their respective shares in the government of the house, and were removable at the will of the abbat, as all the other obedientiarii or officers were.

Also in every *priory*, next under the prior was the subprior, who assisted the prior whilst present, and acted in his stead when absent.

Magister operis. 4. *Magister operis*, master of the fabrick; who probably looked after the buildings, and took care to keep them in good repair.

Eleemosynarius. 5. *Eleemosynarius*, the almoner, who had the oversight of the alms of the house (which were every day distributed at the gate to the poor), who divided the alms upon the founder's day, and at other obits and anniversaries,

ries, and in some places provided for the maintenance and education of the choiristers.

6. *Pitantiarius*, who had the care of the *pietances*; which were allowances (*pittances*) upon particular occasions over and above the common provisions. *Pitantiarius.*

7. *Sacrista*, the sexton, who took care of the vessels, books, and vestments belonging to the church; looked after and accounted for the oblations at the great altar, and other altars and images in the church, and such legacies as were given either to the fabrick or utensils. He likewise provided bread and wine for the sacrament; and took care of burying the dead. *Sacrista.*

8. *Camerarius*, the chamberlain, who had the chief care of the dormitory, and provided beds and bedding for the monks, razors and towels for shaving them, and part of (if not all) their cloathing. *Camerarius.*

9. *Cellerarius*, the cellarer, who was to procure provisions for the monks and all strangers resorting to the convent; viz. all sorts of flesh, fish, fowl, wine, bread, corn, malt, meal, salt, and the like; as likewise wood for firing, and all utensils for the kitchen. *Cellerarius.*

10. *Thesaurarius*, the burfar, who received all the common rents and revenues of the monastery, and paid all the common expences. *Thesaurarius.*

11. *Precentor*, the chaunter, who had the chief care of the choir service, and not only presided over the singing men, organist, and choiristers, but provided books for them, paid them their salaries, and repaired the organs. He had also the custody of the seal, and kept the liber diurnalis or chapter book, and provided parchment and ink for the writers, and colours for the limners of books for the library. *Precentor.*

12. *Hospitalarius*, or *hospitarius*, whose business it was to see strangers well entertained; and to provide firing, napkins, towels, and such like necessaries for them. *Hospitalarius.*

13. *Infirmarius*, who had the care of the infirmary, and of the sick monks who were carried thither, and was to provide them physick and all necessaries, and when they died was to wash and prepare their bodies for burial. *Infirmarius.*

14. *Refectonarius*, who looked after the hall, providing table cloths, napkins, towels, dishes, plates, spoons, and other necessaries for it, and servants also to wait and tend there. He had likewise the keeping of the cups, salts, ewers, and all the silver utensils whatsoever belonging to the house, except the church plate. *Refectonarius.*

15. *Coquinarius*, the cook, who presided in the kitchen for the dressing of victuals. *Coquinarius.*

16. *Gardinarius*, the gardiner. *Gardinarius.*

17. *Portarius*, who seemeth to have taken care of the carriages, and such like; for that he was not the janitor or porter, seemeth probable, for that divers have been promoted to be abbats from that office. *Portarius.*

18. In every great abby there was a large room called the scriptorium, where several writers made it their business to transcribe the missals, liegers, and other books for the use of the house, and more especially
to

to transcribe books for the use of the library. And so zealous were the monks in general to replenish their libraries, that they often procured lands to be given, and churches to be appropriated for that work.

analists.

19. In all the great abbies, there were also persons appointed to take notice of the principal occurrences of the kingdom, and at the end of every year to digest them into *annals*. In these records they particularly preserved the memories of their founders and benefactors; the years and days of their births and deaths, their marriages, children, and successors: So that recourse was sometimes had to them, for proving persons ages and genealogies; tho' it is to be feared, that some of those pedigrees were drawn up from tradition only; and that in most of their accounts they were favorable to their friends, and severe upon their enemies.

The canons also and constitutions of the clergy in their national and provincial synods, and even acts of parliament, were sent to the abbies to be recorded.

IX. Dissolution.

Templars dissolved.

1. The Templars (as was before observed) for the many and great abuses charged upon them, were suppressed so early as the year 1312.

And in the year 1323 their lands, churches, advowsons, and liberties here in England were given by the act of parliament of the 17 *Ed. 2. ft. 3.* to the prior and brethren of the hospital of St John of Jerusalem.

Other dissolutions before the 27 H. 8.

2. About the year 1390, William of Wickham, bishop of Winchester, by the leave of the then pope and king, bought the alien priories of Hornchurch and Writtle in Essex, and settled them on his new college at Oxford. And after the suppression of alien priories, Takely in Essex and Hamele in Hampshire were settled upon this college. And Andover was settled upon his college at Winchester.

About the year 1437, archbishop Chicheley founded All Souls college in Oxford, and got the revenues of several ancient priories to be settled thereon.

About the year 1441, king Henry the sixth founded the college at Eaton, and king's college in Cambridge; and endowed them chiefly with alien priories.

About the year 1459, William Wainfleet bishop of Winchester founded Magdalen college in Oxford, and got the priory of Sele or Attefele in Suffex, and the priory of Seleburne in Hampshire, settled on it. The hospitals also of Aynho and Brakeley in Northamptonshire were united to this college in the year 1484.

In the year 1497, John Alcock bishop of Ely, with the king's consent, suppressed St Rhadegund's nunnery in Cambridgeshire, and with the revenues thereof founded Jesus college there.

In the year 1505, Margaret countess of Richmond and Derby, founded Christ's college in Cambridge, and obtained the pope's licence to suppress the abby of Creyke in Norfolk, and to settle the revenues of it upon that college.

Monasteries.

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About the year 1508, the same countess began to convert an ancient hospital or priory dedicated to St John the evangelist at Cambridge into St John's college, and her executors carried on the design. Bishop Fisher was one of them, and at his desire the nunneries of Heyham in Kent and Broomhalle in Berkshire, and an hospital of regulars at Offprike were suppressed, and the revenues of them settled upon this college.

In the year 1515, Bazen Nose college in Oxford was founded, and William Smith bishop of Lincoln bought the priory of Cold Norton in Oxfordshire of the abbat and convent of Westminster, and gave the lands belonging to it to this new foundation.

Not long after, cardinal Wolsey, by licence of the king and of the pope, obtained a dissolution of above 30 religious houses (most of them very small), for the founding and endowing his colleges at Oxford and Ipswich.

About the same time, a bull was granted by the same pope to cardinal Wolsey, to suppress monasteries, where there were not above six monks, to the value of 8000 ducats a year, for endowing Windsor and King's college in Cambridge: And two other bulls were granted to the cardinals Wolsey and Campeius, where there were less than 12 monks, and to annex them to the greater monasteries: And another bull to the same cardinals to inquire about abbies, to be suppressed in order to be made cathedrals: Altho' nothing appears to have been done in pursuance of these bulls.

And afterwards another bull was granted to the same two cardinals, with further powers relating to the new cathedrals; for some of the dioceses were thought too large, and wanted much (as it was said) to be reduced, that the bishops might the better discharge their offices.

But the promoting of learning seems to have been the chief intent of cardinal Wolsey, and of most others, in suppressing these houses; tho' probably some persons, both then and afterwards, promoted it with other views. Archbishop Cranmer particularly is said to have been much for it, because he could not carry on the reformation without it. And as the increase of learning had rendered the corruptions of the church of Rome more visible; many others might also be against these houses, as nurseries of popish superstition: But other things concurred to bring on their ruin. For, 1. Many of the religious were certainly loose and vicious; tho' probably not so bad as the visitors represented; for those that are to be run down, will always be set in the worst light; and the preamble to the first act of dissolution did set forth, that in the larger monasteries religion was well observed. 2. The casting off the pope's supremacy was urged for casting off the monks, who notwithstanding their subscriptions, were generally thought to be against it in their hearts, and ready to join with any foreign power that should invade the nation; whilst the king was excommunicated by the pope. 3. Their revenues being not employed according to the intent and design of the donors, was also alledged against them. 4. The discovery of many cheats in images,

images, of many feigned miracles, and of counterfeit relicks, brought the monks every where into disgrace, and contributed towards their overthrow. 5. Perhaps the observant friers being so much against the king's divorce from queen Catharine, might exasperate him against all monks and friers in general. But, 6. Not unlikely the great cause might be, the king's want of a large supply, and the peoples willingness to save their money; altho' it was certainly hastened by the account which the visitors gave of them. For after some debate in council how to proceed with these houses, the king appointed commissioners to visit them, and they made such a bad report, that when a motion was shortly after made in parliament, that in order to support the king's state and supply his wants, all the religious houses might be conferred upon the crown which were not able to spend above 200l a year, it met with but little opposition in either house, and an act was passed for that purpose as followeth:

Dissolution by
the 27 H. 8.

3. Forasmuch as manifest sin, vicious carnal and abominable living, is daily used and committed commonly in such little and small abbies, priories, and other religious houses of monks canons and nuns, where the congregation of such religious persons is under the number of 12 persons; whereby the governors of such religious houses, and their covent, spoil consume and utterly waste as well their churches, monasteries, priories, principal houses, farms, granges, lands, tenements, and hereditaments, as the ornaments of their churches, and their goods and chattels, to the high displeasure of almighty god, slander of good religion, and to the great infamy of the king's highness and the realm, if redress should not be had thereof: And albeit that many continual visitations have been heretofore had by the space of 200 years and more, for an honest and charitable reformation of such unthrifty carnal and abominable living, yet nevertheless little or no amendment is hitherto had, but their vicious living shamelessly increaseth, and by a cursed custom is so rooted and infected, that a great multitude of the religious persons in such small houses do rather chuse to rove abroad in apostacy, than to conform themselves to the observation of good religion; so that without such small houses be utterly suppressed, and the religious persons therein committed to great and honourable monasteries of religion in this realm, where they may be compelled to live religiously, for reformation of their lives, the same else be no redress nor reformation in that behalf: In consideration whereof, the king's most royal majesty, being supreme head on earth under god of the church of England, daily studying and devising the increase advancement and exaltation of true doctrine and virtue in the said church, and the extirpating and destruction of vice and sin, having knowledge that the premisses be true, as well by the accounts of his late visitations, as by sundry credible informations, considering also that divers and great solemn monasteries of this realm, wherein (thanks to god) religion is right well kept and observed, be destitute of such full number of religious persons, as they ought and may keep, hath thought good that a plain declaration should be made of the premisses, as well to the lords spiritual and temporal, as to other his loving subjects the commons in this present parliament assembled: Whereupon the said lords and commons, by a great deliberation, finally be resolved, that it is and shall be

be much more to the pleasure of almighty god, and for the honour of this his realm, that the possessions of such small religious houses, now being spent spoiled and wasted for increase and maintenance of sin, should be committed to better uses, and the unthrifty religious persons so spending the same be compelled to reform their lives: Thereupon it is enacted, that his majesty shall have and enjoy to him and his heirs for ever, all such monasteries, priories, and other religious houses of monks canons and nuns, of what kinds of habits rules or order soever they be, which have not in lands tenements, rents, tithes, portions, and other hereditaments, above the clear yearly value of 200*l*; and also all such as within one year next before have been surrendered to the king, or otherwise dissolved. 27 H. 8. c. 28.

By this act about 380 houses were dissolved, and a revenue of 30 or 32,000*l* a year came to the crown; besides about 100,000*l* in plate and jewels. Some say, that 10,000 persons were hereby sent to seek their fortunes in the wide world, without any other allowance than 40*s* and a new gown to some few of them. Others say, that such of the religious as desired to continue their profession, were (according to the aforesaid act) allowed to go into the greater monasteries; and such as chose to go into the world, being priests, had every one the abovementioned allowance, and some of them (for their readiness to surrender) got small pensions for life.

The suppression of these houses occasioned great discontents, fomented probably by the secular as well as regular clergy, which at length broke out into open rebellion. But the rebellion being appeased, the king resolved to suppress the rest of the monasteries, and thereupon appointed a new visitation, requiring the visitors to examine every thing that related either to the conversation of the religious, or their affection to the king and the supremacy, or to their cheats impostures or superstitions, or how they were affected during the late commotions. This caused the greater abbeys to be surrendered apace. For some of the religious having been faulty in the late rebellion, were liable to the king's displeasure, and surrendered their houses to save their lives. Some began to like the reformation, and were upon that account easily persuaded to it. Others, seeing their dissolution approaching, had so much embezzled their revenues, that they were scarce able to keep up their houses. A great many monks were executed for having been in the rebellion; and no doubt but many were prevailed upon by the visitors, who endeavoured both by threats and promises to get their resignations. And in the end by the act of the 31 H. 8. c. 13. it was enacted as followeth:

4. All monasteries, abbatkies, priories, nunneries, colleges, hospitals, houses of friars, and other religious and ecclesiastical houses and places, which have been surrendered or given up since the fourth day of February in the twenty seventh year of his majesty's reign, and which hereafter shall be surrendered or given up, shall be vested in the king. (With a clause respecting privileges and exemptions, which was not in the former act; to wit, that such of them as were discharged from payment of tithes, should continue so; and such as were exempted from the visitation of the ordinary,

should become visitable by the ordinary or by such persons as the king should appoint.) 31 H. 8. c. 13.

By this act no houses were suppressed; but all the surrenders, which either were made or should be made, were confirmed. The mitred or parliamentary abbies were all in being, and most of the abbats present, at the passing of it; and yet none of them either opposed it, or voted against it; but were every one shortly brought to surrender, except the abbats of Colchester, Glastonbury, and Reading, who were therefore accused of high treason, attainted, and executed; and their abbies were seized as forfeited to the king by their attainder.

Dissolution by the 32 H. 8. 5. The next year a bill was brought in and passed, for suppressing the knights of St John of Jerusalem; by which it is enacted as followeth: *The lords spiritual and temporal and commons in this present parliament assembled, having credible knowledge, that divers and sundry the king's subjects, called the knights of the Rhodes, otherwise called knights of St John's, otherwise called friers of the religion of St John of Jerusalem in England, and of a like house being in Ireland, abiding in parts beyond the sea, and having yearly great sums of money out of this realm and out of Ireland, and other the king's dominions, have unnaturally and contrary to their allegiance sustained and maintained the usurped authority of the bishop of Rome; and considering also, that the isle of Rhodes, whereby the said religion took their name and foundation, is surprized by the Turk; and that it were much better that the possessions in this realm, and in other the king's dominions, appertaining to the said religion, should rather be employed and spent within the same, for the defence and safety thereof, than converted to and amongst such unnatural subjects; it is therefore enacted, that the corporation of the said religion in these realms, by whatsoever name or names they be founded incorporated or known, shall be utterly dissolved and void to all intents and purposes.* 32 H. 8. c. 24. s. 1.

And the king, his heirs and successors, shall have and enjoy all that hospital, mansion house, church, and all other houses, edifices, buildings, and gardens to the same belonging, being near to the city of London, in the county of Middlesex, called the house of St John of Jerusalem in England; and also all that hospital, church, and house of Kilmainam in Ireland; and all castles, honours, manors, meases, lands, tenements, rents, reversions, services, woods, meadows, pastures, parks, warrens, liberties, franchises, privileges, parsonages, tithes, pensions, portions, knights fees, advowsons, commandries, preceptories, contributions, responsions, rents, titles, entries, conditions, covenants, and all other possessions and hereditaments, which appertained to the said religion, or to the priors, masters or governors, knights, or other ministers, professed of and in the same, by the pretence or in the right of the said religion. s. 4.

And all privileges of sanctuary, heretofore used or claimed in mansion houses and other places, commonly called St John's hold, and all other sanctuaries belonging to any of the said hospitals, shall be utterly void and of none effect. s. 12.

By the suppression of these greater houses by the two last recited acts, the king obtained a revenue of above 100,000l a year, besides a large sum in plate and jewels. But the religious of these houses had almost all of them something given for their present subsistence, and pensions assigned them for life or until they should be preferred to some dignity or cure of greater value than their pensions.

6. The last act of dissolution that was in this king's reign, was the act Dissolution by of 37 H. 8. c. 4. for dissolving colleges, free chapels, chantries, and the the 37 H. 8. rest, as followeth: *All colleges, free chapels, chantries, hospitals, fraternities, brotherhoods, guilds, and stipendiary priests, having continuance in perpetuity, and being charged or chargeable to the payment of first fruits and tenths, which have been already surrendered, or aliened by covin, or otherwise dissolved, shall be adjudged and deemed in the actual possession of the king, his heirs and successors; and also all and singular such and so many as the king by his commission shall appoint, of the chantries, free chapels, hospitals, colleges, and other the said promotions, now in being, together with all their possessions and revenues, charged or chargeable to the payment of first fruits and tenths; and all colleges chargeable or not chargeable to the said payment of first fruits and tenths, which have lands and other possessions appointed by the donors, for alms to poor people and other charitable deeds to be done.*

This act was made so general, that even those great nurseries of learning, the colleges at Oxford and Cambridge, with those of Winchester and Eaton, were included. And upon the breaking up of the parliament, notice was sent to both the universities; that their colleges were at the king's disposal. This put them upon petitioning for mercy, which was soon obtained, and letters of thanks were sent for the continuance of them.

But the commissioners appointed by this act for giving the king possession of the aforesaid houses and places, did not enter upon many of them before his death, which happened in the January following.

7. And therefore in the beginning of the reign of king Edward the Dissolution by sixth, another act passed, viz. the 1 Ed. 6. c. 14. as followeth: *All the 1 Ed. 6. manner of colleges, free chapels, and chantries, which were not in the actual possession of the late king nor of the king that now is; and all manors, lands, tenements, rents, tithes, pensions, portions, and other hereditaments and things, given for the finding of any priest, anniversary, obit, lamp, light, or other like thing in any church or chapel; — shall be vested in the king, his heirs and successors.*

Provided, that where any fraternity, or priest or incumbent of any chantry, by the first institution thereof ought to have kept a grammar school or a preacher; the king's commissioners shall appoint lands and other hereditaments of such fraternity or chantry, to continue in succession to a schoolmaster or preacher for ever: They shall also have power to make and ordain a vicar to have perpetuity, in every parish church being a college free-chapel or chantry or annexed thereto, that shall come to the king's hands by virtue of this act, and to endow every such vicar sufficiently, having respect to his cure and charge; and also to assign in perpetuity, in every great town and parish, where they shall think necessary to have more priests than one for the ministring the

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sacraments in such town or parish, lands and tenements belonging to any chantry chapel or stipendiary priest, being within the same town or parish.

Also, where any profit or benefit hath been payable to any poor persons, out of any college, free chapel, or chantry, and other the premisses by this act given to the king; the commissioners shall assign lands and other hereditaments, parcel of the premisses, for the maintenance and continuance of the same for ever.

And they shall also have power to appoint lands and other hereditaments, parcel of the premisses, towards the maintenance of piers, jutties, walls, or banks, against the rage of the sea, havens and creeks.

Provided also, that nothing herein shall extend to any college, hostel, or hall within either of the universities of Cambridge and Oxford, nor to any chantry founded within the same (yet so, that the king at any time during his life may alter the names of any the said chantries, and the foundations thereof, within the said universities); nor to the free chapel of St George in the castle of Windsor; nor to the college called St Mary's college of Winchester, nigh Winchester, of the foundation of bishop Wickham; nor to the college of Eaton; nor to the parish church commonly called the chapel of the sea in Newton, within the isle of Ely, in the county of Cambridge; nor to any chapel made for the ease of the people dwelling distant from the parish church, or such like chapel whereunto no more lands or tenements than the churchyard or a little house or close doth pertain; nor to any cathedral church or college where a bishop's see is, nor to the manors lands tenements or other hereditaments thereof (other than to chantries, obits, lights, and lamps within the same).

Provided also, that the king may give authority to his commissioners, to alter the nature and condition of all manner of obits, as well within the said universities, as in any other place not being suppressed; and the same obits so altered, to dispose to a better use, as to the relief of some poor men being students or otherwise.

Provided also, that this act shall not give any copyhold lands to the king.

By this act were suppressed 90 colleges, 110 hospitals, and 2374 chantries and free chapels.

X. Observations.

Number of
houses sup-
pressed.

1. The number of houses and places suppressed from first to last, so far as any calculations appear to have been made, seemeth to be as follows:

Of lesser monasteries whereof we have the valuation	_____	374
Of greater monasteries	_____	186
Belonging to the hospitallers	_____	48
Colleges	_____	90
Hospitals	_____	110
Chantries and free chapels	_____	2374
Total		3182

Besides the friers houses, and those suppressed by Wolsey, and many small houses of which we have no particular account.

2. Sir

2. Sir William Temple, in his introduction to english history, p. 175. Value. says, that William the conqueror found above a third part of the lands of the kingdom in the possession of the clergy: And Sir Robert Atkins, in his Gloucestershire, p. 11. says, that 28,000 knights fees belonged then to the clergy, out of 60,000 in the whole: But both of them seem to speak of the revenues of the clergy in general, viz. seculars as well as regulars; and do not say, what proportion the one bore to the other, nor mention how much was shortly after taken from them by the conqueror.

Archbishop Wake, in his state of the church, p. 312, 319. takes notice, that in the year 1380, which was the 4th year of king Richard the second, the commons made an offer in parliament, that if the clergy would bear a third part of the charge, they would grant to the king 100,000*l* in the way of a poll tax; so that the laity should pay 100,000 marks, and the clergy who occupied a third part of the kingdom 50,000. To this the clergy replied, that their grant was not ever made in parliament, nor ought to be; that the laity neither ought, nor could constrain the clergy, nor the clergy them; that therefore the commons should be charged to do their part, and they might be sure the clergy would not be wanting in theirs. But he observes withal, that the clergy usually granted in this proportion.

In the 27th year of king Hen. 8. the revenues of the clergy were laid at a fourth part only of the revenues of the kingdom. And Mr Collier, in his ecclesiastical history, V. 2. p. 108. says, the revenues of the monks did never exceed the proportion of a fifth part; and considering the leases they granted to laymen upon small rents and easy fines, he thinks their revenues did not exceed a tenth part of the kingdom.

Particularly, the sum total of the clear yearly revenue of the several houses at the time of their dissolution, of which we have any account, seemeth to have been as follows:

	l	s	d
Of the greater monasteries	104919	13	3 ¹ / ₂
Of all those of the lesser monasteries of which we have the valuation	29702	1	10 ¹ / ₂
Knights hospitallers head house in London	2385	12	8
We have the valuation of only 28 of their houses in the country	3026	9	5
Friers houses of which we have the valuation	751	9	0 ¹ / ₄
Total	140,785	6	3 ³ / ₄

And if we consider, that there were many of the lesser monasteries and houses of the hospitallers and friers, of which no computation hath been found; and that not one of the colleges, hospitals, and great number of chantries and free chapels are reckoned in this estimate; and consider withal, the vast quantity of plate and other goods which came into the hands of the king by the dissolution; and the value of money at that time, which was at least six times as much as it is at present; and also that

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that the estimate of the lands was generally supposed to be much under the real worth; we must needs conclude their whole revenues to have been immense.

Number of
persons.

3. It doth not appear that any computation hath been made, of the number of persons contained in the religious houses. Those of the lesser monasteries dissolved by the statute of 27 H. 8. were reckoned at about

If we suppose the colleges and hospitals to have contained a proportionable number, these will make about	10000
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If we reckon the number in the greater monasteries according to the proportion of their revenues, they will be about 35,000; but as probably they had larger allowances in proportion to their number, than those of the lesser monasteries, if we abate 5000 upon that account, they will then be	5347
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One for each chantry and free chapel	30000
--------------------------------------	-------

	2374
Total	47721

But as there were probably more than one person to officiate in several of the free chapels, and there were other houses which are not included within this calculation; perhaps they may be computed in one general estimate at about 50,000.

How the re-
venues were
disposed of.

4. As there were pensions paid to almost all those of the greater monasteries, the king did not immediately come into the full enjoyment of their whole revenues. However out of what did come to him, he founded six new bishopricks, namely, those of Westminster (which was changed by queen Elizabeth into a deanry with 12 prebends, and a school) Peterborough, Chester, Gloucester, Bristol, and Oxford. And in eight other sees, he founded deanries and chapters, by turning the priors and monks into deans and prebendaries, to wit, Canterbury, Winchester, Durham, Worcester, Rochester, Norwich, Ely, and Carlisle. He founded also the colleges of Christ Church in Oxford, and Trinity in Cambridge, and finished King's college chapel there. He likewise founded professorships of divinity, law, physic, and of the hebrew and greek tongues, in both the said universities. He gave the house of Grey friers, and St Bartholomew's hospital, to the city of London; and a perpetual pension to the poor knights at Windsor; and laid out great sums in building and fortifying many ports in the channel, and intended to have done more, but whether out of policy, to give content to the nobility and gentry by selling these lands at low rates, or out of easiness to his courtiers, or an unmeasured lavishness in his expences, he soon disabled himself from it, and nothing further was done by him.

Conclusion.

5. Upon the whole, it is observable, that the dissolution of these houses was an act not of the church, but of the state; prior to the reformation, by a king and parliament of the roman catholic communion, in almost all points except the king's supremacy: And the pope by his bulls and licences had shewed the way before.

One

Monasteries.

71

One thing greatly to be lamented is, that in the hurry of the dissolution, better provision was not made for the performance of divine offices, in such churches as had been appropriated to the monasteries, which both the ministers and parishioners of those places suffer for to this day, and is justly accounted a scandal to our reformation.

Another thing to be lamented is, the loss of a great number of excellent books, to the unspeakable detriment of the learned world. For there was scarce any religious house but had a library, and several of them very good ones. From their chronicles, registers, and other books relating to their own houses and estates, the history and antiquities of the nation in general, and of almost every particular part of it, might have been more fully discovered. The many good accounts of families; of the foundation, establishment, and appropriation of several parish churches, and the endowment of their vicarages; of the ancient bounds of forests, counties, hundreds, and parishes; of the privileges, tenures, and rents, of many manors and estates, and the like, which we meet with in such of their books as have been preserved, is a sufficient proof that the advantage would have been still greater, if we had been so fortunate as to preserve more of them.

It is not presumed here to determine, whether they were more hurtful or beneficial to the kingdom. The choicest records and treasures of learning were preserved in these houses. They were schools of learning and education; for every convent had one person or more appointed for this purpose; and all the neighbours that desired it, might have their children taught grammar and church musick there, without any expence to them. In the nunneries also, young women were taught to work and to read: And not only the lower rank of people, but most of the noblemens and gentlemens daughters were taught in those places.—All the monasteries were in effect great hospitals; and were most of them obliged to relieve many poor people every day. They were likewise houses of entertainment for almost all travellers.—And the nobility and gentry provided not only for their old servants in these houses by corodies, but for their younger children and impoverished friends, by making them first monks and nuns, and in time priors and prioresses, abbats and abbesses.

On the other hand, they were very injurious to the secular and parochial clergy; by taking to themselves many prebends and benefices, by getting many churches appropriated to them, and pensions out of many others; and by the exemptions they got from the episcopal jurisdiction, and from the payment of tithes. And they were no less injurious to the nation in general, by depriving the publick of so many hands, which might have been very serviceable to it in trade and other employments; by greatly diminishing the number of people, in consequence of the institution of celibacy; and by their houses or churches being sanctuaries for almost all manner of offenders. And if the superstition had continued, and the zeal of establishing religious institutions had exerted it self with equal vigour to the present age; we should by this time have been

a nation

a nation of monks and friers, or probably have become a prey to some foreign invader.

Moravians. See Dissenters.

Mortmain.

Mortmain,
what.

1. **M**ORTMAIN is, where lands and tenements are given to any corporation, sole or aggregate, ecclesiastical or temporal; and is called *mortmain*, as coming into a *dead hand*; because the lords of the fee could receive nothing of the alienee any more than from a dead hand, but lost their escheats and services before due to them. 1 Inst. 2.

Restraints of
mortmain.

2. Before the statutes of mortmain, bodies once incorporated might have been endowed, *perpetuis futuris temporibus*, without licence from the king or any other. Gibs. 641.

But by *ch. 36. of the great charter, 9 H. 3.* commonly called the statute of mortmain; *it shall not be lawful to any to give his lands to any religious house, and to take the same land again to hold of the same house. Nor shall it be lawful to any house of religion to take the lands of any, and to lease the same to him of whom he received it. And if any from henceforth give his lands to any religious house, and thereupon be convicted, the gift shall be utterly void, and the land shall accrue to the lord of the fee.*

There were two causes of making this statute; one, that the services that were due out of such fees, and which in the beginning were created for the defence of the realm, were unduly withdrawn; the other cause was, that the chief lords did lose their escheats, wardships, reliefs, and the like. 2 Inst. 75.

But the ecclesiastical persons (who in this were to be commended, that they had ever the best learned men in the law that they could get, of their counsel) found many ways to creep out of this statute; to wit, religious men, as abbots, priors, and other ecclesiastical persons regular, to purchase lands holden of themselves, or take leases for long term of years, and many other devices they had to escape out of this statute; and bishops, parsons, and other ecclesiastical persons secular, took themselves to be out of this statute. 2 Inst. 75.

The statute of the 7 Ed. 1. st. 2. commonly called the statute *De religiosis*, intended to provide against these devices, which is as followeth: *Where of late it was provided, that religious men should not enter into the fees of any without licence and will of the chief lord; and notwithstanding, such religious men have entred as well into their own fees, as into the fees of other men, appropriating and buying them, and sometimes receiving them of the gift of others, whereby the services that are due of such fees, and which at the beginning were provided for the defence of the realm, are wrongfully with-*

withdrawn, and the chief lords do lose their escheats of the same; it is ordained, that no person, religious or other, whatsoever he be, that will buy or sell any lands or tenements, or under the colour of gift or lease, or that will receive by reason of any other title whatsoever it be lands or tenements, or by any other craft or engine will presume to appropriate to himself, under pain of forfeiture of the same, whereby such lands or tenements may any wise come into mortmain: and if any person, religious or other, do presume either by craft or engine to offend against this statute, it shall be lawful for the lord of the fee to enter, and upon his neglect the king shall enter.

That will buy or sell any lands or tenements, &c.] The translation here, as in many other places, in the printed books, seemeth to be imperfect. The sense is this: *It is ordained, that no person, religious or other, whatsoever he be, shall presume to buy or sell, or under colour of gift or lease or any other title whatsoever to take of any person, or by any other means by craft or engine to appropriate unto himself, any lands or tenements, whereby such lands and tenements may in any wise come into mortmain; on pain of forfeiture of the same.* The words are, in the original, “Statuimus—quod
“nullus religiosus aut alius quicumque terras aut tenementa aliqua emere
“vel vendere aut sub colore donationis aut termini vel alterius tituli cu-
“juscumque ab aliquo recipere aut alio quovis modo arte vel ingenio
“sibi appropriare presumat sub forisfactura eorundem per quod ad
“manum mortuam terre et tenementa hujusmodi deveniant quoquo
“modo.”

Either by craft or engine] A man would have thought that this should have prevented all new devices; but they found also an evasion out of this statute: for this statute extendeth but to gifts alienations and other conveyances made between them and others, by craft or engine: and therefore they gave over them, and they pretending a title to the land that they meant to get, brought a *præcipe quod reddat* against the tenant of the land, and he by consent and collusion should make default, and thereupon they should recover the land, and enter by judgment of law; and so the statute was defrauded. 2 Inst. 75.

When this new invention was also provided for, and taken away by the statute of the 13 Ed. 1. c. 32. yet they found out an evasion out of all these statutes; for now they would neither get any land by purchase, gift, lease, or recovery, but they caused the lands to be conveyed by feoffment or in other manner to divers persons and their heirs, to the use of them and their successors, by reason whereof they took the profits. But this was enacted by the statute of the 15 R. 2. c. 5. to be mortmain, within the forfeiture of the said statute of the 7 Ed. 1. 2 Inst. 75.

But after all, the said statute of the 15 R. 2. did extend only to bodies corporate; therefore by the 23 H. 8. c. 10. it is enacted as follows: *Where by reason of feoffments and other assurances made of trust, of lands and other hereditaments to the use of parish churches, chapels, guilds, fraternities, commonalties, companies or brotherhoods, erected and made of*

by common assent of the people without any corporation, or for obits or other like uses, there groweth and issueth to the king and other lords and subjects of the realm the like losses and other inconveniences, and is as much prejudicial to them, as is in case where lands are aliened into mortmain; it is enacted that all and every such uses shall be void; and all collateral assurances in defrauding of this statute shall be also void; and this statute shall be interpreted most beneficially to the destruction of such uses.

M. 34 & 35 El. Martindale and Martin. In ejectment by the lessee of Sir Edward Clere against the lessee of Peacock, for certain lands in Thetford, upon a special verdict the case was, An ancestor of Sir Edward Clere devised certain lands to divers and their heirs (under whom Peacock claimed) to the use of them and their heirs, upon this trust and confidence, that they out of the profits of it should erect a free school, and pay so much to the master yearly, and so much to the usher, and should give 10l a year to five poor men; and the question was, whether these uses were void by the statute of the 23 H. 8. c. 10. And after argument, all the justices held, that this disposition was not restrained by the statute; for that was only to restrain superstitious uses, and never intended to restrain uses that were in favour of learning and relief of the poor. Cro. El. 288.

And lord Coke says, that any man, notwithstanding this statute, may give lands or other hereditaments to any person or persons and their heirs, for the finding of a preacher, maintenance of a school, relief and comfort of maimed soldiers, sustenance of poor people, reparations of churches, highways, bridges, causeways, discharging of the poor inhabitants of a town of common charges, for the making of a stock for poor labourers in husbandry, and poor apprentices, and for the marriage of poor virgins, or for any other charitable uses; and it is good policy upon every such feoffment or estate, to reserve to the feoffor and his heirs a small rent, or to express some such consideration of some small sum; so that the feoffees may be seized to their own use and not to the use of the feoffor, by which it is out of doubt that this statute cannot make void the use. 1 Co. 26. Gibf. 645.

Relaxation of
those re-
straints.

3. Tho' the prohibition by the statute of mortmain in the *magna charta* was absolute; yet with proper licence alienations might still be made, as appears from the preamble of the statute *De religiosis* before mentioned. 2 Inst. 74.

And by the 18 Ed. 3. st. 3. c. 3. If prelates, clerks beneficed, or religious people, which have purchased lands, and the same have put in mortmain, be impeached upon the same before our justices, and they shew our charter of licence, and process thereupon made by an inquest of ad quod damnum, or of our grace, or by fine; they shall be freely let in peace without being farther impeached for the same purchase.

And by the 17 C. 2. c. 3. Every owner of any impropriation, tithes, or portion of tithes in any parish or chapelry, may give and annex the same or any part thereof, unto the parsonage or vicarage of the said parish church or chapel where the same do lie or arise, or settle the same in trust for the benefit of the

the said parsonage or vicarage, or of the curate and curates there successively where the parsonage is impropriate and no vicar endowed; without any licence of mortmain. §. 7.

And if the settled maintenance of any parsonage, vicarages, churches and chapels united, or of any other parsonage or vicarage with cure, shall not amount to the full sum of 100*l* a year clear and above all charges and reprises; it shall be lawful for the parson, vicar, and incumbent of the same, and his successors, to take and purchase to him and his successors, lands tenements rents tithes or other hereditaments, without any licence of mortmain. §. 8.

This licence was frequently given by the kings, notwithstanding the statutes to the contrary; partly by reason that the statutes gave to the king a right of entry in case of alienation in mortmain, if the lords did not enter within such a time; and this seemeth reasonable, because thereby the king only gives up that right of entry which those statutes do give him for the forfeiture, which every mesne lord might also do as well, so far as he had a right by those statutes: and partly, because the kings claimed a power inherent in the crown to dispense with statutes or acts of parliament. 2 Haw. 391.

But this dispensing power was carried so very high in the reign of king James the second, and found to be of such dangerous consequence as to make the execution of the most necessary laws in effect precarious, and merely dependent on the pleasure of the prince; and it seeming highly incongruous, that the king should have a kind of absolute unlimited power in dispensing with laws, wherein the church and state have the highest interest, when at the same time he hath no power at all to dispense with any law which vests the least right or interest in a private subject; it was found by experience necessary to declare and enact, by the 1 W. sess. 2. c. 2. that no dispensation by non obstante to any statute shall be allowed; but that the same shall be held void and of none effect, except a dispensation be allowed in such statute. 2 Haw. 391.

But with respect to alienations in mortmain, power was afterwards given to the king to grant licences as followeth, by the statute of the 7 & 8 W. c. 37. viz. Whereas it would be a great hindrance to learning and other good and charitable works, if persons well inclined may not be permitted to found colleges or schools for encouragement of learning, or to augment the revenues of colleges or schools already founded, by granting lands tenements rents or other hereditaments to such colleges or schools, or to grant lands or other hereditaments to other bodies politick or incorporated, now in being, or hereafter to be incorporated, for other good and publick uses; it is enacted, that it shall be lawful for the king his heirs and successors, when and so often as they shall think fit, to grant to any person or persons, bodies politick or corporate, their heirs and successors, licence to aliene in mortmain, and also to purchase take and hold in mortmain, in perpetuity or otherwise, any lands tenements rents or hereditaments whatsoever, of whomsoever the same shall be holden; and the same shall not be subject to any forfeiture, by reason of such alienation or acquisition.

And by the 2 & 3 An. c. 11. It shall be lawful for any person by deed inrolled, to give to the corporation for augmenting the maintenance of the poorer clergy, any lands or goods for that use and purpose, without any licence or writ of *ad quod damnum*; the statute of mortmain, or any other statute or law notwithstanding.

Further re-
straints by the
9 G. 2. c. 36.

4. By the 9 G. 2. c. 36. Whereas gifts or alienations of lands tenements or hereditaments in mortmain are prohibited or restrained by magna charta and divers other wholesome laws, as prejudicial to and against the common utility, nevertheless this publick mischief hath of late greatly increased, by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths to the disherison of their lawful heirs; it is enacted, that from and after June 24, 1736, no manors lands tenements rents advowsons or other hereditaments corporeal or incorporeal whatsoever, nor any sum or sums of money goods chattels stocks in the publick funds securities for money or any other personal estate whatsoever to be laid out or disposed of in the purchase of any lands tenements or hereditaments, shall be given granted aliened limited released transferred assigned or appointed or any ways conveyed or settled, to or upon any person or persons bodies politick or corporate or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever: unless such gift conveyance appointment or settlement of any such lands tenements or hereditaments sum or sums of money or personal estate (other than stocks in the publick funds) be made by deed indented sealed and delivered in the presence of two or more credible witnesses, twelve kalendar months at least before the death of such donor or grantor (including the days of the execution and death), and be inrolled in his majesty's high court of chancery within six kalendar months next after the execution thereof; and unless such stocks be transferred in the publick books usually kept for the transfer of stocks, six kalendar months at least before the death of such donor or grantor (including the days of the transfer and death); and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof; and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him. §. 1.

Provided, that nothing herein before mentioned, relating to the sealing and delivery of any deed or deeds twelve kalendar months at least before the death of the grantor, or to the transfer of any stock six kalendar months before the death of the grantor or person making such transfer, shall extend to any purchase of any estate or interest in lands tenements or hereditaments, or any transfer of any stock to be made really and bona fide for a full and valuable consideration actually paid at or before the making such conveyance or transfer, without fraud or collusion. §. 2.

And all gifts grants conveyances appointments assurances transfers and settlements whatsoever, of any lands tenements or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any

any lands tenements or hereditaments, or of any stock money goods chattels or other personal estate or securities for money, to be laid out in the purchase of any lands tenements or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall after the said 24th day of June 1736, be made in any other manner or form than by this act is directed, shall be void. s. 3.

Provided always, that this act shall not extend to make void the dispositions of any lands tenements or hereditaments, or of any personal estate to be laid out in the purchase of any lands tenements or hereditaments, which shall be made in any other manner or form than by this act is directed, to or in trust for either of the two universities, or any of the colleges or houses of learning within either of the said universities; or to or in trust for the colleges of Eton, Winchester, or Westminster, for the better support and maintenance of the scholars only upon the foundations of the said colleges of Eton, Winchester, and Westminster. s. 4.

Provided nevertheless, that no such college or house of learning, which doth or shall hold or enjoy so many advowsons of ecclesiastical benefices, as are or shall be equal in number to one moiety of the fellows or persons usually stiled or reputed as fellows; or where there are or shall be no fellows or persons usually stiled or reputed as fellows, to one moiety of the students upon the foundation, whereof any such college or house of learning doth or may, by the present constitution of such college or house of learning consist, — be capable of purchasing acquiring receiving taking holding or enjoying any other advowsons of ecclesiastical benefices by any means whatsoever: the advowsons of such ecclesiastical benefices as are annexed to, or given for the benefit or better support of the headships of any of the said colleges or houses of learning, not being computed in the number of advowsons hereby limited. s. 5.

In the case between *Ashburnham* and *Bradshaw*: — Whereas by an order made on the hearing of this cause in the high court of chancery the 11th day of Dec. 1738, by the right honourable the lord high chancellor of Great Britain, his lordship (among other things) declared the will of Robert Bradshaw in the said order named to be well proved, and that the first question in the cause appeared to be a point of law arising on the construction of a new act of parliament which had never come in judgment before, and to be a matter of great consequence; for which reason his lordship thought it fit, in order to the settling the law thereupon, that the opinion of all the judges should be taken on the following case: viz. Robert Bradshaw, clerk, on the 20th day of November, in the year 1734, duly made and executed his last will and testament in writing; and by the said will gave and devised divers lands and tenements to trustees and their heirs, in trust or for the benefit of certain charitable uses therein mentioned, amongst several other trusts. The statute of the ninth year of his present majesty's reign, for restraining the disposition of lands in mortmain, commenced from and after the 24th day of June in the year 1736. In July 1736 the testator died, without revoking or altering his said will.

Quare,

Mortmain.

Quære, Whether such gift or devise, so far as the same relates to the charitable uses aforesaid, be good in law notwithstanding the statute, or not? *Ans*: We have heard counsel on all sides, and are of opinion, that the gift or devise, so far as the same relates to the charitable uses aforesaid, is good in law notwithstanding the said statute.

Serjeant's Inn
Dec. 4. 1739.

Wm Lee.
J. Willes.
J. Comyns.
F. Page.

Law. Carter.
E. Probyn.
J. Fortescue A.
W. Fortescue.

W. Chapple.
T. Parker.
M. Wright.
(Judge Denton
being absent.)

It hath been determined, that if a man deviseth his land to trustees *to be turned into money, and that money laid out in a charity*, it is not good within this act; for it is an interest arising out of land. So a devise of a mortgage, or of a term for years, to a charity, is not good; for the words of the statute are, that the lands shall not be conveyed or settled, for any estate or interest whatsoever, or any ways charged or incumbered, in trust or for the benefit of any charitable use.

So also money given to be laid out in lands is expressly within the act; but money given generally is not; so also the residue of a personal estate hath been decreed not to be within the act; and if money be given to be laid out in lands or otherwise to a charitable use, it hath been determined that such devise is good, by reason of the words [*or otherwise*]. As in the case of *Soresby and Hollins*, Aug. 6. 1740. John Naylor in 1738 made his will in these words; "I will and desire, that my executors, within twelve months after my decease, do settle and secure, by purchase of lands of inheritance, or otherwise, as they shall be advised, out of my personal estate, one annuity or yearly payment of 50l, to be paid yearly and distributed for ever, by my executors their heirs and assigns, among the poor and indigent people of Leeke in the county of Stafford, in such manner as they shall think fit. And my will also is, that my executors do settle and secure one other annuity of 5l, to be paid yearly to the vicar of Leeke for the time being for ever, for preaching an annual sermon on every 12th day of October." And the testator devised the residue of his personal estate, to be equally divided between his sisters Mrs Soresby and Mrs Hollins.—By the lord chancellor Hardwicke: The only question in this case is, whether the devise of the two annuities of 50l and 5l to charitable uses, is void by the late statute of mortmain. It is insisted upon by the plaintiffs, the residuary legatees, that it is void; because the direction of the devise is, to settle and secure the annuity of 50l, by a trust of lands of inheritance: and tho' the words *or otherwise* are added, they will not vary the case; for Mr Naylor's intention was, to give the annuity out of lands of inheritance. But I am of opinion upon this act of parliament, that this bequest was not void, and that there is no authority to construe it to be void, if by law it can possibly be made good. The act of parliament is not at all aimed against perpetual charities merely as such, or to prevent the establish-

establishment or creation of them, but is designed against the cases of perpetual charities in lands, and (as the title imports) to restrain the disposition of lands whereby the same become unalienable. The whole recital, and enacting part of the statute, take notice only of the unalienable disposal of land, whereby heirs are disinherited; and therefore the alienation or conveyance of lands to such purposes are prohibited. And tho' there is a clause to prohibit money being laid out in lands to such purposes as would make them unalienable; yet there is no restriction whatsoever upon any one, from leaving a sum of money by will, or any other personal estate, to charitable uses, provided it be to be continued as a personalty, and the executors or trustees are not obliged or under a necessity of laying it out in land by virtue of any direction of the testator for that purpose. Consider then, whether this clause and devise in the will fall within the restraint and prohibition of the statute. And in the first words they do fall within them. For the testator directs, that his executors shall *settle and assure by purchase of lands of inheritance* ——— And if the testator had rested upon such first words, the devise had been clearly void. But then he goes on, in the disjunctive — *or otherwise, as my executors shall be advised*. And if a devise in a will is in the disjunctive, and leaves to the executors two methods to do a particular thing by, the one lawfully, and the other prohibited by law; can any court say, because one method is unlawful, that therefore the other is so, and the whole bequest void? No; for if one bequest is lawful, that shall be pursued, and take effect. ——— It has been further argued against the devise, that the words [*for ever*] shew the annuities must arise out of some real estate, which only is capable of supplying them for ever: For personal funds are too perishable and transitory in their nature, to answer such everlasting annuities: And suppose a particular sum were vested in stock, with design to purchase a particular yearly sum or annuity; it may so happen that the company may be quite dissolved, or that stock may fall, or interest be so reduced that half the annuity may not be produced. But these objections may be over-ruled. For if the company should be dissolved, the principal stock may be taken out, and vested in some other company. And there may be annuities that may probably continue for ever, and and yet not payable out of land. I will mention an instance of one, which has lasted a century and a half, and may exist perpetually; which is, Sir Thomas White's charity, being a disposition of money to be employed by continual rotation, in loans to poor tradesmen of several sums to be let for a settled number of years, and then to be repaid. And any man may, at this day, give by will a perpetual charity in this manner. But if a man by will secures such loans by lands or purchase of lands; such devise shall be void, and contrary to the late statute of mortmain. If this case had been to be considered by the court, before the act; it would, as the safest method to secure the charity for ever, have recommended and directed a purchase of lands: But when this court is precluded from doing it in this manner; if it can be obtained in any other, there is no reason to say the devise is void. ——— It is said too, that the

Mortmain.

words [*heirs and assigns*] import a purchase in land or some real thing; for no personal thing can descend to heirs: and if the money is to be invested in a personal security, it will not go to the heirs, but to the executors; and so the intention of the testator will not be pursued. I will suppose, an obligor binds himself his heirs executors and administrators in a sum of money to a papist, who obtains judgment upon the bond and takes out an *Elegit*; in this case I think it has been held at the assizes, or at least it might very well have been so held, that the papist cannot maintain an ejectment, and yet the bond is good to bind the person of the obligor and his personal representatives, but not to charge his land or his heirs who represent him in his landed capacity. And this comes up to the present case; which may secure the charity in a double sense, either upon land or personalty, if the law would allow both; and if the law prohibits one only, it certainly allows the other. And I am of opinion upon the whole, that there is nothing that makes this bequest void in every part; but that it is good in that way which the law does not forbid. But I would not have it questioned, if a man should by his will direct a sum of money to be laid out in land or upon rent charge to be secured upon land for any charity, and in the mean time (till it can be laid out) to be invested in government securities for the benefit of the charity, but that that bequest will be void; because the final end and intention of such testator was to dispose of his money in land, and the investiture of it in government and personal securities was but to secure it till a proper purchase of land or rent charge offered. — As to the annuity of 5*l*, there are fewer objections to that than to the other: for there is no direction at all for any money or personal estate to be laid out in land; for the executors are only willed to *secure and settle 5*l* a year* for the purpose there mentioned, and it must be secured upon a personal fund consistent with the will and intention of the testator, and not contradictory to the words of the act of parliament. — And as it is often said in old books by the judges, that “I was by at the making of the act of parliament, and the meaning and intention of it was then said to be this or that;” so I was by at the making of this statute, and it was at that very time said by the legislators, that it would not hinder any charitable distribution of a personal estate. Therefore it was decreed, that the devise was good; and that the money should be invested in south sea stock, for the charitable purposes mentioned in the will.

Mortuary.

Mortuary,
what.

1. **M**ORTUARY seems to have been originally an oblation made at the time of a person's death. In the Saxon times there was a funeral duty to be paid, which was called *pecunia sepulchralis*, and *sym-bolium animæ*, or the *soul-shot*; which was required by the council at Æn-

ham and inforced by the laws of king Canutus; and was due to the church which the party deceased belonged to, whether he was buried there or not. 1 *Still.* 171.

Dr Stillingfleet makes a distinction between *mortuaries* and *corse presents*: The *mortuary*, he says, was a right settled on the church, upon the decease of a member of it; and a *corse present* was a voluntary oblation usually made at funerals. 1 *Still.* 172, 3.

And it seemeth, that in ancient times a man might not dispose of his goods by his last will and testament, without first assigning therein a sufficient mortuary to the church. And this, in a constitution of archbishop Winchelsea, is called the *principal legacy*; so nominated (saith Lindwood) because they who died did bequeath the best or the second best of their goods to god and the church, in the first place, and before other legacies. *Lind.* 196.

And in another constitution of the same archbishop it is enjoined, that if a person at the time of his death have three or more quick goods, the first best shall be given to him to whom it is due (that is, to the lord of the fee for a heriot); and the second best shall be reserved to the church, where the deceased person received the sacraments whilst he lived. *Lind.* 20, 184.

And this was usually carried to the church with the dead corps. And Mr Selden quotes an ancient record, where it is recited, that a *corse* was present at the church the same day in the name of a mortuary, and that the parson received him, according to the custom of the land and of holy church. *Seld. Hist. Titb.* 287.

2. By the statute of the 21 H. 8. c. 6. *Forasmuch as question and doubt hath arisen upon the order manner and form of demanding receiving and claiming of mortuaries, otherwise called corse presents, as well for the greatness and value of the same, which, as hath lately been taken, is thought over-excessive to the poor people and other persons of this realm, as also for that such mortuaries or corse presents have been demanded and levied for such as at the time of their death have had no property in any goods or chattels, and many times for travelling and wayfaring men, in the places where they have sortuned to die; to the intent therefore that all doubt contention and uncertainty herein may be removed, and as well the generality of the king's people therein remedied, as also the parsons vicars parish-priests curates and others having interest in such mortuaries and corse presents indifferently provided for, it is enacted, that no parson, vicar, curate, nor parish priest, nor any other spiritual person, nor their farmers, bailiffs, nor lessees, shall take receive or demand of any person within this realm, for any person dying within the same, any manner of mortuary or corse present, nor any sum of money nor any other thing for the same, more than is hereafter mentioned; nor shall convent or call any person before any judge spiritual for the recovery of any such mortuaries or corse presents, or any other thing for the same, more than is hereafter mentioned: on pain to forfeit for every time so demanding receiving taking or conventing or calling any such person before any spiritual judge, so much in value as they shall take above the sum limited by this act, and over that 40s to the party grieved contrary to this act, to be recovered by action of debt. 1. 1, 2.*

Limitation of
mortuaries by
statute.

Mortuary.

And no manner of mortuary shall be taken or demanded of any person whatsoever, which at the time of his death hath in moveable goods under the value of ten marks. f. 3.

And no mortuary shall be given or demanded of any person, but only in such place where heretofore mortuaries have been used to be paid and given; and in those places none otherwise but after the rate and form hereafter mentioned. id.

And no person shall pay mortuaries in more places than one, that is to say, in the places of their most dwelling and habitation, and there but one mortuary. id.

And no parson, vicar, curate, parish priest or other, shall for any person dying or dead, and being at the time of his death of the value in moveable goods of ten marks or more, clearly above his debts paid, and under the sum of 30l, take for a mortuary above 3s 4d in the whole. And for a person dying or dead, being at the time of his death of the value of 30l or above, clearly above his debts paid, in moveable goods, and under the value of 40l; there shall no more be taken or demanded for a mortuary, than 6s 8d in the whole. And for any person dying or dead, having at the time of his death of the value in moveable goods of 40l or above, to any sum whatsoever it be, clearly above his debts paid, there shall be no more taken paid or demanded for a mortuary, than 10s in the whole. id.

Provided, that for no woman being covert baron, nor child, nor for any person not keeping house, any manner of mortuary, nor any thing or money by way of mortuary, shall be paid: Nor also for any wayfaring man, or other, that dwelleth not nor maketh residence in the place where they shall happen to die; but that the mortuary of such wayfaring persons be answerable in places where mortuaries be accustomed to be paid, and in manner and form, and after the rate before mentioned, and none otherwise, in the place or places where such wayfaring persons at the time of their death had their most habitation, house, and dwelling places, and no where else. f. 4.

Provided, that it shall be lawful to all parsons, vicars, curates, parish priests, and other spiritual persons, to take any sum of money or other thing, which by any person dying shall be disposed given or bequeathed to them, or any of them, or to the high altar of the church. f. 5.

And no mortuaries nor corse presents, nor any sum of money or other thing for any mortuary or corse present, shall be demanded or taken in the parts of Wales nor in the marches of the same, nor in the town of Berwick, but only in such places of the same where mortuaries have been accustomed to be paid: and in those places no mortuaries nor corse presents, nor any other thing for mortuary or corse present, shall be demanded or taken, but only after the form and manner above specified, and none otherwise, nor of any other person than is limited by this act, upon the pain contained therein. f. 6.

Provided, that it shall be lawful to the bishops of Bangor, Landaff, St David's, and St Asaph, and likewise to the archdeacon of Chester, to take such mortuaries of the priests within their dioceses and jurisdictions, as heretofore have been accustomed. f. 7.

Provided also, that in such places where mortuaries have been accustomed to be taken of less value than is aforesaid; no person shall be compelled to pay in any such place any other mortuary, or more for any mortuary, than hath been accustomed; nor that any mortuary in such place shall be demanded or taken of any person exempt by this act, nor in any wise contrary to this act, upon the pain afore limited. id.

By the 12 An. st. 2. c. 6. The clause in the said statute, so far as it relates to the taking of any mortuary or corse present upon the death of any clergyman within the dioceses of *Bangor*, *Landoff*, *St David's*, and *St Asaph*, is repealed; and certain sine-cures and prebends are annexed to the respective sees, in recompence and in lieu of the mortuaries of priests dying within the said respective dioceses.

And as to the archdeaconry of *Chester*, it is said, that the custom there was, that the archdeacon (and after the erection of the episcopal see there, the bishop as archdeacon) had for a mortuary, after the death of every priest dying within the archdeaconry of *Chester*, the best horse or mare, his saddle, bridle, spurs, his best gown or cloak, his best hat, his best upper garment under his gown, his tippet, and his best signet or ring. *Cro. Car.* 237.

But by the 28 G. 2. c. 6. The aforesaid clause, so far as it relates to the taking of any mortuary or corse present upon the death of any clergyman within the archdeaconry of *Chester*, shall immediately after the living of *Wareton* shall become void be repealed; and the said living shall be annexed to the see of *Chester*, in compensation of such mortuaries.

And by the 26 H. 8. c. 15. Forasmuch as divers subjects inhabited within the archdeaconry of *Richmond* in the county of *York*, be and of long time have been sore and grievously exalted and impoverished, by the parsons vicars and others such as have benefices and spiritual promotions within the same, as by taking of every person when he dieth, in the name of a pension or of a portion, sometime the ninth part of all his goods and chattels, and sometime the third part, to the open and manifest impoverishing of most part of the king's poor subjects inhabited and deceasing within the same; it is enacted, that no manner of spiritual person, or other, having any benefice or other spiritual promotion within the said archdeaconry, shall in any wise ask levy demand or take, after the decease of any person, any such portions or pensions, or any other demand or duty in the name or lieu of the same, on pain of a præmunire; but that all the king's subjects of the said archdeaconry, and their executors and administrators, shall be ordered and used for their goods and chattels after their decease, in like manner as is contained in the statute of the 21 H. 8. c. 5. for probate of testaments, and none otherwise; any use, custom, bull, composition, prescription, or ordinance to the contrary notwithstanding.

The rise of which custom was this: Of very ancient time, the inhabitants of the parish of *St Rumald's kirk*, and after their example the inhabitants of the several other parishes within the archdeaconry of *Richmond*, being dissatisfied for that the executors or administrators of persons

sons deceased gave nothing of the deceased's personal estate to the parish church, for the minister (according to the superstition of those times) to pray for the soul of the deceased; whereas, by the custom established within the province of York (and at that time throughout the whole kingdom) a certain portion of the deceased's personal estate ought to go and be disposed for the welfare of the soul of the deceased, which portion such person himself could not otherwise dispose of by will, nor his administrator after his death in case of intestacy; and this was, if the deceased did leave a wife and also a child or children, a third part of the clear personal estate; if he left a wife and no child, or a child or children and no wife, then a moiety; and if neither wife nor child, then the whole was the dead man's portion, to be disposed for the good of his soul: Now the inhabitants aforesaid observing, that the executors or administrators took and applied this whole deadman's portion to their own use, came to an agreement and resolution amongst themselves, to settle and establish for ever inviolably a determinate share and proportion of the said deadman's part, to be given to the incumbent of their parish church to pray for the soul of the deceased. But in process of time their posterity, thinking this concession too burdensome, applied to the court of Rome for redress; setting forth, that the clergy, altho' they received, according to the custom of the kingdom of England, one of the two best quick goods of the deceased, demanded also one other of the best quick goods; and likewise the ninth part of all the moveable goods of the deceased, if he had a wife and children; if he had a wife and no child, or a child or children and no wife, then a sixth part; and if he had neither wife nor child, then a third part. The pope, having granted a commission to hear and determine the cause, did finally in the year 1254 order and decree, that for the future the clergy should receive only one of the two best quick goods; and if the deceased left a wife and children, his whole clear personal estate should be divided into three parts, of which the wife should have one, the children another, and the third part (being the deadman's part) should be divided into four, of which four parts the church should receive one; if the deceased left a wife and no child, or a child or children and no wife, then the whole should be divided into two parts, of which the wife or children respectively should have one, and the other part (being the deadman's share) should be divided into five, of which five parts the church should receive one; if he had neither wife nor child, then the whole (as pertaining intirely to the deceased) should be divided into six, of which six parts the church should have one. So that in the first case, where there was both wife and children, the church should have a twelfth part; in the second case, where there was a wife and no child, or a child or children and no wife, a tenth part; and in the third case, where there was neither wife nor child, the church should have a sixth part. *Registr. Hon. de Richm.* 101.

And after the statute aforesaid of the 21 H. 8. for limiting the sums to be paid for mortuaries, it seemeth that the clergy of the said arch-deaconry would not have this to be a mortuary, but called it a pension

or

or portion; for the abolishing of which claim and demand this statute was made.

3. By the statute of *Circumspecte agatis*, 13 Ed. 1. st. 4. *If a parson demand mortuaries, in places where a mortuary hath been used to be given; all such demands shall be made in the spiritual court: and in all such cases the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.* How recoverable.

Sir Simon Degge is of opinion, that an action also will now lie upon the afore said statute of the 21 H. 8. c. 6. But that statute plainly supposeth, that the recovery of the money shall be solely in the spiritual court, as the recovery of the mortuary was before. *Watf. c. 53.*

In the case of *Johnson and Oldam*, M. 12 W. A prohibition was moved for, to be directed to the spiritual court, to stay a suit there for a mortuary, upon a suggestion of the statute, and that there was no custom in this case for the payment of it: And it was urged, that no mortuary was due but by custom; and therefore the custom here being denied, they ought not to proceed in the spiritual court. Against which, it was argued, that the statute of *Hen. 8.* hath saved the jurisdiction to the spiritual court, where mortuaries have been usually paid; besides, they ought first to plead in the spiritual court, that there is not any such custom; and then, upon refusal to admit the plea there, is the time to move the court of king's bench, and not before: but in this case they have not pleaded this matter in the spiritual court. And by Holt chief justice; a prohibition cannot be granted, without a denying of the custom in the spiritual court, which is not done here. And the whole court seemed to be against the prohibition. And a rule was made to hear counsel on both sides. And afterwards the rule was discharged by the court. *L. Raym. 609.*

But if the custom be denied, and the spiritual court will not admit that plea, a prohibition will go; and they shall not try the custom there. *Cro. El. 151.*

But where the custom of paying a mortuary was owned, and the only question in the spiritual court was, whether it belonged to the vicar or impropriator, a prohibition in such case hath been denied. *1 Keb. 919.*

In the case of *Torrent and Burley*, M. 13 G. In the exchequer: A bill was brought to discover, whether the defendant's husband died worth 40l, so as to be liable to pay the plaintiff a mortuary; and praying relief. Upon answer, admitting assets, but denying the custom, the plaintiff went into a proof of his right; and several witnesses were examined on both sides. And at the hearing, the bill was dismissed with costs, as to the relief; because that was properly at law, or in the spiritual court: and in a bill against one person only, the right could not be established. *Str. 715.*

Musters in the church-yard. See Church.

Ne admittas.

NE *admittas* (so called from those words in the writ, *Prohibemus ne admittas*) is a writ directed to the bishop at the suit of one who is patron of any church, and he doubts that the bishop will collate a clerk of his own, or admit a clerk presented by another, to the same benefice: then he that doubts it shall have this writ, to prohibit the bishop that he shall not collate or admit any to that church, pending the suit. *Terms of the L.*

New style. See Calendar.

Nocturn.

NOCTURN, was a service so called, from the ancient christians rising in the night to perform the same. *Gibb. 263.*

Nomination to a benefice. See Benefice.

Non-conformists. See Dissenters.

Non-residence. See Residence.

Notable goods. See Wills.

Notary publick.

Notary, who. 1. **A** Notary was anciently a scribe, that only took *notes* or minutes, and made short draughts of writings, and other instruments, both publick and private. But at this day we call him a notary publick, who confirms and attests the truth of any deeds or writings, in order to render the same authentick. *Ayl. Par. 382.*

The law books give to a notary several names or appellations; as, *actuarius*, *registrarius*, *scriniarius*, and such like. All which words are put to signify one and the same person. But in England, the word *registrarius* is confined to the officer of some court, who has the custody of the records

records and archives of such court; and is oftentimes distinguished from the *actuary* thereof. But a register ought always to be a notary publick; for that seems to be a necessary qualification of his office.

2. A notary publick is appointed to this office by the archbishop of How appoint. Canterbury; who in the instrument of appointment decrees, that "fulled. "faith be given, as well in as out of judgment, to the instruments by "him to be made." Which appointment is also to be registered and subscribed by the clerk of his majesty for faculties in chancery. *I Ought.* 486. *Ayl. Par.* 385.

3. A notary on his appointment must swear, "that he will faithfully How sworn. exercise the office of notary publick; that he will faithfully make contracts, wherein the consent of parties is required, by adding or diminishing nothing, without the will of the parties, that may alter the substance of the fact; that if in making any instrument the will of one party only is required, he will in such case add or diminish nothing that may alter the substance of the fact, against the will of such party; that he will not make instruments of any contract, in which he shall know there is a violence or fraud; that he will reduce contracts into an instrument or register; and after he shall have so reduced the same, that he will not maliciously delay to make a publick instrument thereupon, against the will of him or them, on whose behalf such contract is to be so drawn: Saving to himself his just and accustomed fees."

4. A notary publick (or actuary) that writes the acts of court, ought His office in not only to be chosen by the judge, but approved also by each of the the contestation of a suit. parties in suit; for tho' it does of common right belong to the office of the judge, to assume and chuse a notary for reducing the acts of court in every cause into writing, yet he may be refused by the litigants: for the use of a notary was intended, not only on account of the judge, to help his memory in the cause, but also that the litigants might not be injured by the judge. *Ayl. Par.* 382.

And particularly, the office of a notary in a judicial cause is employed about three things: First, He ought to register and inroll all the judicial acts of the court, according to the decree and order of the judge, setting down in the act the very time and place of writing the same. Secondly, He ought to deliver to the parties, at their especial request, copies and exemplifications of all such judicial acts and proceedings, as are there enacted and decreed. And, thirdly, He ought to retain and keep in his custody the originals of such acts and proceedings, commonly called the *protocols* (*πρωτα κωδα*, the *notes*, or *first draughts*.)

5. As a notary is a publick person, so consequently all instruments made by him are called publick instruments; and a judicial register or record made by him, is evidence in every court, according to the civil and canon law. And a bishop's register establishes a perpetual proof and evidence, when it is found in the bishop's archives; and credit is given not only to the original, but even to an authentic copy exemplified. *Ayl. Par.* 386.

Authenticity of his proceedings.

And

Notary publick.

And one notary publick is sufficient for the exemplification of any act; no matter requiring more than one notary to attest it. *id.*

And the rule of the canon law is, that one notary is equal to the testimony of two witnesses. *Gibf.* 996.

Stamps.

6. By the several stamp acts, the admission of a notary shall be upon a treble 40 s stamp.

And every notarial act shall be on a 2 s 6 d stamp.

Novel disseisin.

THE writ of assise of novel disseisin (*novæ disseisinæ*) lieth, where tenant for life, or tenant in fee simple, or in tail, is disseised of his lands or tenements, or put out thereof against his will. *F. N. B.* 408.

November the fifth. See **Holidays.**

Nuncupative will. See **Wills.**

Oaths.

Lawfulness of
an oath.

NONE shall bring into dispute the determinations of the church, concerning oaths to be taken in the ecclesiastical or in the temporal courts; on pain of being declared an heretick. *Arund.* Lind. 297.

As we confess that vain and rash swearing is forbidden christian men by our lord Jesus Christ, and James his apostle; so we judge that christian religion doth not prohibit, but that a man may swear when the magistrate requireth, in a cause of faith and charity, so it be done according to the prophet's teaching, in justice, judgment, and truth. *Art.* 39.

The giving of every oath must be warranted by act of parliament, or by the common law time out of mind. *2 Inst.* 73.

Oath ex of-
ficio.

2. The oath *ex officio*, is an oath whereby any person may be obliged to make any presentment of any crime or offence, or to confess or accuse himself or herself, of any criminal matter or thing, whereby he or she may be liable to any censure, penalty, or punishment whatsoever.

By a canon of archbishop Boniface: *Laymen shall be compelled by excommunication, if need be, to take an oath to speak the truth, when inquiry shall be made by the prelates and judges ecclesiastical, for the correction of sins and excesses.* Lind. 109.

After-

Afterwards, *E. 4* *ſ.* In the time of the parliament, the lords of the council at Whitehall demanded of Popham and Coke chief justices, upon motion made by the commons in parliament, in what cases the ordinary may examine any person *ex officio* upon oath. And upon good consideration and view of the books, they answered to the lords of the council at another day in the council chamber: 1. That the ordinary cannot constrain any man, ecclesiastical or temporal, to swear generally to answer to such interrogatories as shall be administered unto him; but ought to deliver to him the articles upon which he is to be examined, to the intent that he may know, whether he ought by the law to answer to them. And so is the course of the chancery; the defendant hath a copy of the bill delivered unto him, or otherwise he need not to answer it. 2. That no man, ecclesiastical or temporal, shall be examined upon the secret thoughts of his heart, or of his secret opinion; but something ought to be objected against him, which he hath spoken or done. 3. That no layman may be examined *ex officio*, except in two causes (matrimonial and testamentary); and that was grounded upon great reason: for laymen for the most part are not lettered, wherefore they may easily be inviepled and intrapped, and principally in heresies and errors. *12 Co. 26.*

Again, *H. 13* *ſ.* *Dighton* and *Holt's* case. They were committed by the high commissioners, because they refused to take the oath *ex officio*; whereupon an habeas corpus being awarded, it was returned, that they were committed, because they being convented for slandrous words, against the book of common prayer and the government of the church, and being tendred the oath to be examined upon these causes, they refused, and were therefore committed. And after three terms deliberation, the court now gave their resolution, that they ought to be delivered. And the reason thereof Coke chief justice declared to be, because this examination is made to cause them to accuse themselves of the breach of a penal law; which is against law, for they ought to proceed against them by witnesses, and not inforce them to take an oath to accuse themselves. *Cro. ſa. 388.*

Finally, by the statute of *13 C. 2. c. 12.* it is enacted, that, *it shall not be lawful for any person, exercising ecclesiastical jurisdiction, to tender or administer to any person whatsoever, the oath usually called the oath ex officio, or any other oath, whereby such person to whom the same is tendred or administered, may be charged or compelled to confess, or accuse, or to purge him or her self of any criminal matter or thing, whereby he or she may be liable to censure or punishment.*

But in other cases, where the course of the ecclesiastical courts hath been, to receive answers upon oath, they may still receive them. And therefore in the case of *Hern* and *Brown*, *T. 31 C. 2.* where a suit was for payment of the proportion assessed towards the repair of the church, the defendant, offering to give in his answer, but not upon oath, prayed a prohibition, because it was refused. The court, after hearing arguments, denied the prohibition; for they said, it was no more than the

chancery did to make defendants answer upon oath in such like cases. *Gibf.* 1011. 1 *Ventr.* 339.

And some years before that, in the case of *Goulson* and *Wainwright*, it was held by the court, that if articles *ex officio* are exhibited in the spiritual court for matters *criminal*, and the party is required to answer upon oath, he may have a prohibition; but if it be a *civil* matter, he cannot do so, for then he is bound to answer. *Gibf.* 1011. 1 *Sid.* 374.

Oath of calumny.

3. The oath of *calumny* was required by the Roman laws, of all persons engaged in any lawsuit, obliging both plaintiffs and defendants, at the beginning of the cause, to swear that their demands and their defences were sincere and upright, without any intention to give unnecessary trouble, or to use quirks and cavils. 1 *Domat* 439.

And by a legatine constitution of *Otho* it is thus ordained: *The oath of calumny, in causes ecclesiastical and civil, for speaking the truth in spirituals, whereby the truth may be more easily discovered, and causes more speedily determined, we ordain for the future to be taken in the kingdom of England, according to the canonical and legal sanctions; the custom obtained to the contrary notwithstanding.* *Athon* 60.

The oath of calumny] Which oath was this: "You shall swear, That
" you believe the cause you move is just: That you will not deny any
" thing you believe is truth, when you are asked of it: That you will
" not (to your knowledge) use any false proof: That you will not out
" of fraud request any delay, so as to protract the suit: That you have
" not given or promised any thing, neither will give or promise any
" thing, in order to obtain the victory, except to such persons, to whom
" the laws and the canons do permit: So help you God." *Consuet.* 91.

Of calumny] *Jusjurandum calumniæ; sc. vitandæ*: for the avoiding of calumny. *Athon* 60.

To be taken] And this, both by the plaintiff and the defendant. Which if they shall refuse respectively, the plaintiff in such case shall lose his cause, and the defendant shall be taken as having confessed. *Athon* 60.

The custom obtained to the contrary notwithstanding] By this it appeareth that by the custom of the realm of England, the oath of calumny was not to be administered. Nevertheless this custom was not so general as in this canon is alledged. The case was thus: *Laymen* were free by the custom of the realm from taking of that oath, unless it were in causes *matrimonial* and *testamentary*; and in those two cases, the ecclesiastical judge might examine the parties upon their oath, because contracts of matrimony, and the estates of the dead, are many times secret, and do not concern the shame and infamy of the party, as adultery, incontinency, simony, heresy, and such like. And this appeareth by two writs in the register, directed to the sheriff, to prohibit the ordinaries from calling laymen to that oath against their wills, except in those two cases. 2 *Inst.* 657. 12 *Co.* 26. *Gibf.* 1011.

But

But this custom extended not to those of the clergy, but to lay people only; for that they of the clergy, being presumed to be learned men, were better able to take the oath of calumny. 2 Inst. 657.

But if, in a penal law, the jurisdiction of the ordinary be saved, as by 1 Eliz. for hearing of masses, or by 13 El. for usury, or the like, neither clerk nor layman shall be compelled to take the oath of calumny; because it may be an evidence against him at the common law, upon the penal statute. 2 Inst. 657. 12 Co. 27.

This oath had long continuance in the ecclesiastical court: and it had the warrant of an act of parliament, in 2 H. 4. c. 15. whereby it was enacted, that diocesans shall proceed according to the canonical sanctions, which act was repealed by 25 H. 8. c. 14. but was revived in the reign of queen Mary, and then all the martyrs who were burnt were examined upon their oaths; and then again by the 1 Eliz. c. 1. it was finally repealed. And the matter touching this oath at this day standeth thus: It is confessed, as well by the said provincial constitution of *Otho*, as by the register, that the said constitution was against the custom of the realm: and no custom of the realm can be taken away by a canon of the church, but only by act of parliament; and especially in case of an oath, which is so sacred a thing, and which generally concerneth all the nobility, gentry, and commonalty of the realm of both sexes: And by the statute of the 25 H. 8. c. 19. no canon against the king's prerogative, the law, statutes, or custom of the realm is of force; which is but declaratory of the common law. 2 Inst. 658. 12 Co. 29.

So that the result of the matter, upon these premisses, will be this: So far as this constitution was against the custom of the realm, it is of no avail: So far as it is warranted by the custom, it is still of force; and consequently extendeth to the clergy, and to laymen in cases matrimonial and testamentary, and also to persons who take the said oath voluntarily, and not by compulsion.

For the writs in the register do only require, that laymen be not compelled to answer against their will; so that if any assent to it, and take it without exception, this standeth with law. 12 Co. 27.

4. The *voluntary* or *decisive* oath, is given by one party to the other, The voluntary when one of the litigants, not being able to prove his charge, offers to or decisive stand or fall by the oath of his adversary; which the adversary is bound oath. to accept, or to make the same proposal back again, otherwise the whole shall be taken as confessed by him. Wood Civ. L. 314.

And this seemeth to have some foundation in the common law, in what is called *waging of law*; which is a privilege that the law giveth to a man, by his own oath to free himself, in an action of debt upon a simple contract. 1 Inst. 155, 157. 2 Inst. 45.

But this oath, in the ecclesiastical courts, is now obsolete, and out of use. 1 Ought. 176.

5. The oath of *truth*, is when the plaintiff or defendant is sworn upon the libel or allegation, to make a true answer of his knowledge as to his own fact, and of his belief of the fact of others. This differs from the

former, for it is not decisive; and the plaintiff or defendant may proceed to other proofs, or prove the contrary to what is sworn. *Wood Civ. L. 314.*

Oath of malice.

6. The oath of *malice*, is when the party proponent swears, that he doth not propose such a matter or allegation, out of malice, or with an intent unnecessarily to protract the cause. *1 Ought. 158.*

And this oath may be administered at any time during the suit, at the judge's discretion, whether the parties consent to it or not. *id.*

Suppletory oath.

7. The *necessary* or *suppletory* oath, is given by the judge to the plaintiff or defendant, upon half proof already made. This being joined to the half proof *supplies*, and gives sufficient power to the judge to condemn or absolve. It is called the *necessary* oath, because it is given out of necessity, at the instance of the party, whether the other party will consent to it or not. But when the judge doth administer it, he ought first to be satisfied, that there is an half proof already made, by one unexceptionable witness, or by some other sort of proof. If the cause is of an high nature, and there is a temptation to perjury; or if it is a criminal cause; or if more witnesses might be produced to the same fact; then this oath cannot take place. *Wood Civ. L. 314. Ayl. Par. 391.*

Before the delegates at Serjeants Inn, Jan. 22. 1717. *Williams* and *Lady Bridget Osborne*. The question below was, whether Mr. *Williams* was married to the lady *Bridget Osborne*; the minister who performed the ceremony, having formerly confessed it extrajudicially, but now denying it upon oath. So that there being variety of evidence on both sides, the judge upon hearing the cause required, according to the method of ecclesiastical courts, the oath of the party, which the civilians term the suppletory oath, that he was really married as he supposeth in his libel and articles. The accepting this oath (as was agreed on both sides) is discretionary in the judge, and is only used where there is but what the civilians esteem a *semiplena probatio*; for if there be full proof, it is never required; and if the evidence doth not amount to a half proof, it is never granted, because this oath is not evidence strictly speaking, but only confirmation of evidence; and if that evidence doth not amount to a half proof, a confirmation of it by the party's own oath will not alter the case. Upon admitting the party to his suppletory oath, the lady appeals to the delegates. So that the question now was not upon the merits, whether there really was a marriage or not, but only upon the course of the ecclesiastical courts, whether the judge in this case ought to have admitted Mr. *Williams* to his suppletory oath, as a person that had made an half proof of that which he was then to confirm. The questions before the delegates were two: First, whether the suppletory oath ought to be administered in any case, to enforce a half proof: And, secondly, admitting it might, whether the evidence in this case amounted to a half proof, so as to intitle Mr. *Williams* to pray that his suppletory oath might be received. As to the first, it was argued to be against all the rules of the common law, that a man should be a witness in his own cause. It is not allowed in the temporal courts in any case but that

of

of a robbery, which being presumed to be secret, the party is admitted to be a witness for himself. In the temporal courts, no man can be examined that has any interest, tho' he be no party to the suit. On the other side many authorities and precedents were cited out of the civil law, to prove this practice of allowing a suppletory oath. And therefore the court held, that by the canon and civil law, the party agent, making a half proof, was intitled to pray that his suppletory oath might be received: And tho' it be against the rules of the common law, yet this being a cause of ecclesiastical cognizance, the civil and not the common law is to be the measure of their proceedings; and therefore this practice being agreeable to the civil law, is well warranted in all cases where the civil law is the rule, and the exercise of it lies in the discretion of the judge. Secondly, It being therefore established, that a person making half proof is intitled to his oath, the next question was, what is, according to the notion of the civilians and canonists, a half proof. With them it was argued on the behalf of the lady, that nothing is esteemed as a *full* proof, unless there be two positive unexceptionable witnesses to the very matter of fact, as to the marriage; that a half proof, which is the next degree of evidence, is what is affirmed by the oath of one witness as to the principal fact, and confirmed by concurrent circumstances: It must be by *one* witness; it must be evidence that concludes necessarily, and not by presumption; there must be no presumption to encounter it; and the witness must of good repute: That matrimonial causes require the greatest certainty; and where that is the sole question, the proof ought to be fuller, than where it comes in by incident, as on granting administration. To this it was answered on the other side, that half proof implies no more than what the common lawyers call presumptive evidence; and that is properly called presumptive evidence, which hath no one positive witness to support it, but relies only on the strength of circumstances. And when there is one witness, who deposeth directly to the principal fact, this immediately ceaseth to bear the name of presumption, and assumes that of positive evidence. And that which in the temporal courts passeth for positive evidence, is the same degree of evidence with the full proof of the canonists and civilians. The suppletory oath doth *ex vi termini* import, that there has been no one positive witness to the principal fact; and he that demands to be admitted to take his oath, doth thereby admit that he hath produced no conclusive evidence to the point in issue, and therefore the party himself supplies the place of the witness. There is no fixing the bounds of an half proof; for in many cases circumstances may overbear positive evidence: and then if those circumstances should not be esteemed to amount to an half proof, when the positive evidence would exceed it; that would be to overthrow the positive evidence, by that which is not so strong. Half proof therefore they concluded to be, that degree of evidence which would incline a reasonable man to either side of the question; and implies in the notion of it, that a positive witness hath not deposed to the principal fact. And in this case, tho' there

there was no positive conclusive evidence, but only such as depended on circumstances, as confessions, and letters, and unusual familiarities; yet the court thought it amounted to an half proof, and consequently that the dean of the arches had done right, in admitting Mr. *Williams* to his supplementary oath: And therefore they dismissed the appeal, with 150l costs. *Str.* 80.

The party praying this oath, must exhibit a schedule ingrossed, with his hand to it, wherein is written so much as is proved more than half proof, or half proof; and must take his oath to speak the truth of his own certain knowledge. 1 *Ought.* 177.

Oath in animam domini.

8. By the ancient canon law, a proctor having a special proxy, may take the oath of calumny, and may swear *in animam domini*; upon the soul of his client. *Wood Civ. L.* 298.

But by *Can.* 132. It is ordained, that forasmuch as in the probate of testament and suits for administration of the goods of persons dying intestate, the oath usually taken by proctors of courts, *In animam constituentis*, is found to be inconvenient; therefore from henceforth every executor, or suitor for administration, shall personally repair to the judge in that behalf, or his surrogate, and in his own person (and not by proctor) take the oath accustomed in these cases.

Oath of damages.

9. The oath *in litem*, or of *damages*, is that by which the plaintiff estimates the damages in the loss of any thing; and which the judge may allow or moderate. *Wood Civ. L.* 314.

Oath of costs.

10. The oath of *expences* and *costs*, is where the litigant (which gained the sentence or decree), upon the taxing of costs, affirms upon his oath that these charges were necessarily expended by him in the prosecution of his suit. *Wood Civ. L.* 314.

All these oaths are unknown to the common law, but they are all used in the courts governed by the civil or canon law. *Wood Civ. L.* 314.

But they are only made use of in civil causes, and cannot be properly applied to criminal. *Wood Civ. L.* 333. But the oath next following regardeth only criminal cases: That is to say,

Oath of purgation.

11. The oath of *purgation*; which oath was administered where the defendant was suspected to be guilty; and if he swore that he was innocent, and produced honest men for his compurgators, he was to be discharged. If he could not bring such compurgators, to swear that they also believed him innocent, he was esteemed as convicted of such crime. *Wood Civ. L.* 332.

But by the aforesaid act of the 13 C. 2. c. 12. It shall not be lawful for any person exercising ecclesiastical jurisdiction, to tender or administer to any person, any oath whereby such person to whom the same is tendered or administered, may be charged or compelled to confess, or accuse, or to *purge* him or her self of any criminal matter or thing, whereby he or she may be liable to censure or punishment.

Other oaths of use in the courts.

12. Besides the above recited, there are also divers other oaths of use in the courts: As, the oath of the proctor, that he hath not questioned the

the witnesses; the oath of the proctor, concerning his bill of costs; the oath of the party, for the obtaining of absolution, that he will stand to the law, and obey the commands of the church; the oath of the party, on his being admitted in *forma pauperis*; the oath of the party, concerning matter newly come to his knowledge; the oath of the party, that he believes he can prove the matter alledged; the oath of a creditor, concerning his debt; the oath of an executor, administrator, accountant, churchwardens, questmen, curates, preachers, schoolmasters, physicians, surgeons, midwives, and other such like. 1 *Ought*. 176.

13. The oath of *allegiance* is very ancient: and by the common law, Oath of alle- every freeman at his age of twelve years was required, in the leet (if he giance. were in any leet), or in the tourn (if he were not in any leet), to take the oath of allegiance. 2 *Inst*. 73.

But the clergy, not being bound to attend at the tourn or leet, were consequently so far exempted from taking this oath of allegiance. 2 *Inst*. 121. 1 *H. H.* 64.

But they were bound nevertheless to do homage to the king, for the lands held of him in right of the church. 1 *H. H.* 71, 72.

14. The oath of *supremacy* came in after the reformation, in conse- Oath of su- quence of abolishing the papal authority. And this oath all clergymen premacy. especially were bound to take.

15. The oath of *abjuration* came in after the revolution; received Oath of abja- some alterations in the first year of queen Anne; and again in the ration. first year of king George the first; and so continues to this time. And this oath, together with the oaths of allegiance and supremacy, all clergymen as well as others are bound to take, on their being promoted to offices.

16. In all cases wherein by any act of parliament an oath shall be al- Oaths of lowed, authorized, or required, the solemn affirmation or declaration of quakers. any of the people called quakers shall be allowed instead of such oath, altho' no particular or express provision be made for that purpose in such act. 22 *G. 2. c.* 46. *f.* 36.

And if any person making such affirmation or declaration, shall be lawfully convicted of having wilfully, falsely, and corruptly affirmed or declared any matter or thing, which if the same had been deposed upon oath in the usual form, would have amounted to wilful and corrupt perjury; he shall suffer as in cases of perjury. *id.*

But no quaker by virtue hereof shall be qualified or permitted to give evidence in any criminal cases, or to serve on juries, or to bear any office or place of profit in the government. *f.* 37.

17. By the 22 *G. 2. c.* 30. Every person being a member of the pro- Of the mora- testant episcopal church, known by the name of *Unitas fratrum*, or the viars. united brethren, which church was formerly settled in *Moravia* and *Bohemia*, and are now in *Prussia*, *Poland*, *Silesia*, *Insatia*, *Germany*, the *United provinces*, and also in his majesty's dominions, who shall be required to take an oath, shall be allowed instead of such oath to make their to- lemm

lemn affirmation: But this not to qualify them to give evidence in a criminal cause, or to serve on juries.

Of infidels or
aliens.

18. Such oaths ought to be imposed on heathens and jews, which they allow to be obligatory. *Wood Civ. L.* 313.

Thus a Jew is to be sworn upon the old testament; and perjury upon the statute may be assigned upon this oath. 2 *Keb.* 314.

And when Jews take the oath of abjuration, the words [*on the true faith of a christian*] shall be omitted. 10 *G. c.* 4. *f.* 18.

Thus also Mahometans shall be sworn upon the Koran. *Str.* 1104.

In the case of *Omichund* and *Barker*, *H.* 18 *G.* 2. a commission issued out of chancery, to take the answer of *Omichund* the defendant, and the depositions of several witnesses, who were heathens of the Gentou religion, in their own country manner, at Calcutta in the East Indies; and the commission being executed and returned, the depositions were allowed to be read in the court of chancery, by lord Hardwicke, assisted by the two lords chief justices and the lord chief baron. The manner of taking which oath was thus: There were three bramins or priests present, and the oath being interpreted to each witness, the witness touched the feet of one of the bramins, and two being bramins or priests did touch his hand. 2 *Abr. Eq. Caf.* 397.

At the rebel assizes at Carlisle, in the year 1745, many of the Scotch witnesses refusing to be sworn otherwise than in their own country manner: the judges so far submitted, as to allow them to be sworn after the Scotch manner for finding the bills by the grand jury, but did not admit it upon the trials.

Oaths and de-
clarations to
qualify for
offices.

19. By the 25 *C.* 2. *c.* 2. Every person who shall be admitted into any office civil or military, or shall receive any pay by reason of any patent or grant from the king, or shall have any command or place of trust in England or in the navy, or shall have any service or employment in the king's household, shall within three months after his admission receive the sacrament according to the usage of the church of England, in some publick church on the lord's day, immediately after divine service and sermon: And in the court where he takes the oaths (as hereunder mentioned) he shall first deliver a certificate of such his receiving the sacrament, under the hands of the minister and churchwarden, and shall then make proof of the truth thereof by two witnesses on oath. And they shall also, when they take the said oaths, make and subscribe the declaration against transubstantiation. *f.* 2, 3, 9.

Any office civil or military] Ecclesiastical offices do not seem to be included within this description; and consequently it seemeth not requisite for clergymen, in qualifying for ecclesiastical offices, to produce any certificate of their having received the sacrament, nor to make or subscribe the declaration against transubstantiation. But they are to take the oaths in like manner as civil officers, by the 1 *G.* 2. *c.* 13. which enacteth as follows:

Every

Every person who shall be admitted into any office civil or military; or shall receive any pay by reason of any patent or grant from the king; or shall have any command or place of trust in England, or in the navy; or shall have any service or employment in the king's household; all ecclesiastical persons; heads and members of colleges, being of the foundation, or having any exhibition, of eighteen years of age; and all persons teaching pupils; schoolmasters and ushers; preachers and teachers of separate congregations,——shall (within six kalendar months after such admission, 9 G. 2. c. 26. s. 3.) take and subscribe the oaths of allegiance, supremacy, and abjuration, in one of the courts at Westminster, or at the general or quarter sessions. s. 2. And this to be between the hours of nine and twelve in the forenoon, and no other. 25 G. 2. c. 2. s. 2.

But this not to extend to churchwardens, nor to any like inferior civil office. 1 G. s. 2. c. 13. s. 20.

And every person making default herein, shall be incapable to hold his office: and if he shall execute his office, after the time expired, he shall, upon conviction, be disabled to sue in any action, or to be guardian, or executor, or administrator, or capable of any legacy or deed of gift, or to bear any office, or vote at an election for members of parliament, and shall forfeit 500l. to him who shall sue. 1 G. s. 2. c. 13. s. 3.

But by the 1 G. 3. c. 12, persons having omitted to qualify themselves in due time, shall be indemnified (if their place is not filled up) provided they qualify on or before Feb. 12. 1762. And there is commonly an indemnifying clause to the same purpose, in some act, every two or three years.

In like manner by the 20 G. 2. c. 48. persons who had omitted to subscribe the declaration against popery, of the 30 C. 2. were indemnified, if they subscribed on or before Dec. 1. 1747.

And persons forfeiting their office may take a new grant thereof, on their taking the oaths, and conforming; provided it was not filled up before. 1 G. s. 2. c. 13. s. 14.

In the universities; where persons shall not take the oaths, or shall not produce a certificate thereof, to be registred in their proper college, and others be not elected in their places within twelve months, the king shall appoint and nominate. 1 G. s. 2. c. 13. s. 12, 13.

20. The oath of allegiance by the 1 G. s. 2. c. 13. is this:

Forms thereof

I A. B. do sincerely promise and swear, that I will be faithful, and bear true allegiance to his majesty king George: So help me god.

The oath of supremacy by the same statute:

I A. B. do swear, that I do from my heart abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position, that princes excommunicated or deprived by the pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever: And I do declare, that no foreign prince, person, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm: So help me god.

The oath of abjuration, by the same act is this :

I A. B. do truly and sincerely acknowledge, profess, testify, and declare in my conscience, before god and the world, that our sovereign lord king George is lawful and rightful king of this realm, and all other his majesty's dominions thereunto belonging. And I do solemnly and sincerely declare, that I do believe in my conscience, that the person pretended to be prince of Wales, during the life of the late king James, and since his decease, pretending to be, and taking upon himself the stile and title of king of England, by the name of James the third, or of Scotland, by the name of James the eighth, or the stile and title of king of Great Britain, hath not any right or title whatsoever to the crown of this realm, or any other the dominions thereto belonging : And I do renounce, refuse, and abjure any allegiance or obedience to him. And I do swear, that I will bear faith and true allegiance to his majesty king George, and him will defend, to the utmost of my power, against all traiterous conspiracies and attempts whatsoever, which shall be made against his person, crown, or dignity. And I will do my utmost endeavour, to disclose and make known, to his majesty and his successors, all treasons and traiterous conspiracies, which I shall know to be against him, or any of them. And I do faithfully promise, to the utmost of my power, to support, maintain, and defend the succession of the crown against him the said James, and all other persons whatsoever ; which succession, by an act, intituled, An act for the further limitation of the crown, and better securing the rights and liberties of the subject, is and stands limited to the princess Sophia, electress and dutchess dowager of Hanover, and the heirs of her body, being protestants. And all these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever. And I do make this recognition, acknowledgment, abjuration, renunciation, and promise, heartily, willingly, and truly, upon the true faith of a christian : So help me god.

The declaration against transubstantiation, by the 25 C. 2. c. 2. is this :

I A. B. do declare, that I do believe, that there is not any transubstantiation in the sacrament of the lord's supper, or in the elements of bread and wine, at or after the consecration thereof by any person whatsoever.

The declaration against popery, by the 30 C. 2. st. 2. c. 1. is as follows :

I A. B. do solemnly and sincerely, in the presence of god, profess, testify, and declare, that I do believe, that in the sacrament of the lord's supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ, at or after the consecration thereof by any person whatsoever : And that the invocation, or adoration of the virgin Mary, or any other saint, and the sacrifice of the mass, as they are now used in the church of Rome, are superstitious and idolatrous : And I do solemnly in the presence of god profess, testify, and declare, that I do make this declaration, and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by English protestants, without any evasion, equivocation,

or

or mental reservation whatsoever, and without any dispensation already granted me for this purpose by the pope, or any other authority or person whatsoever, or without any hope of any such dispensation from any person or authority whatsoever, or without thinking that I am or can be acquitted before god or man, or absolved of this declaration, or any part thereof, altho' the pope, or any other person or persons, or power whatsoever, shall dispense with or annul the same, or declare that it was null and void from the beginning.

Or without any hope of dispensation, — or without thinking that I am or can be acquitted &c.] By this disjunctive [or] here twice occurring, this declaration seemeth to be rendred somewhat loose and unconnected, and leaveth scope for equivocation. The word [and] seemeth to have been intended, and would render the declaration more compact.

21. By the 8 G. c. 6. The quakers solemn affirmation, instead of an oath, is this :

I A. B. do solemnly, sincerely, and truly declare and affirm.

By the same act, instead of the oaths of allegiance and supremacy, quakers shall be allowed to make the following declaration of fidelity :

I A. B. do solemnly and sincerely promise and declare, that I will be true and faithful to king George ; and do solemnly, sincerely, and truly profess, testify and declare, that I do from my heart abhor, detest, and renounce, as impious and heretical, that wicked doctrine and position, that princes excommunicated or deprived by the pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare that no foreign prince, person, prelate, state or potentate, hath or ought to have, any power, jurisdiction, superiority, prebeminence, or authority, ecclesiastical or spiritual, within this realm.

And by the same act, they shall be allowed to take the effect of the abjuration oath, in these words :

I A. B. do solemnly, sincerely, and truly acknowledge, profess, testify, and declare, that king George is lawful and rightful king of this realm, and of all other his dominions and countries thereunto belonging, and I do solemnly and sincerely declare, that I do believe the person pretended to be the prince of Wales, during the life of the late king James, and since his decease, pretending to be, and taking upon himself the stile and title of king of England, by the name of James the third, or of Scotland, by the name of James the eighth, or the stile and title of king of Great Britain, hath not any right or title whatsoever to the crown of this realm, nor any other the dominions thereunto belonging ; and I do renounce and refuse any allegiance or obedience to him. And I do solemnly promise, that I will be true and faithful, and bear true allegiance to king George, and to him will be faithful against all traiterous conspiracies and attempts whatsoever, which shall be made against his person, crown, or dignity. And I will do my best endeavour to disclose and make known to king George, and his successors, all treasons and traiterous conspiracies, which I shall know to be against him, or any of them. And I will be true and faithful to the succession of the crown against him the said James, and all other

Forms of quakers affirmations and declarations.

Oaths.

persons whatsoever, as the same is and stands settled by an act, intituled, An act declaring the rights and liberties of the subject, and settling the succession of the crown, to the late queen Anne, and the heirs of her body, being protestants; and as the same, by one other act, intituled, An act for the further limitation of the crown, and better securing the rights and liberties of the subject, is and stands settled and intailed, after the decease of the said late queen; and for default of issue of the said late queen, to the late princess Sophia, electress and dutchess dowager of Hanover, and the heirs of her body, being protestants. And all these things I do plainly and sincerely acknowledge, promise, and declare, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words without any equivocation, mental evasion or secret reservation whatsoever. And I do make this recognition, acknowledgment, renunciation, and promise, heartily, willingly, and truly.

The quakers profession of their belief, by the 1 W. c. 18. is this:

I A. B. profess faith in god the father, and in Jesus Christ his eternal son, the true god, and in the holy spirit, one god blessed for evermore; and do acknowledge the holy scriptures of the old and new testament to be given by divine inspiration.

Of the Moravians.

22. The affirmation of the Moravians shall be in these words, "I A. B. do declare, in the presence of almighty god, the witness of the truth of what I say." 22 G. 2. c. 30.

Obit.

AN *obit* was an office performed at funerals, when the corps was in the church, and before it was buried; which afterwards came to be anniversary, and then money or lands were given towards the maintenance of a priest who should perform this office every year. *Nelf. Tit. Obit. Syl. Par. 395.*

Oblations. See Offerings.

Obventions. See Offerings.

Offerings.

OFFERINGS, oblations, and obventions are one and the same thing; tho' *obvention* is the largest word. And under these are comprehended, not only those small customary sums commonly paid by every person when

Offerings.

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when he receives the sacraments of the lord's supper at Easter, which in many places is by custom 2d from every communicant, and in London 4d an house; but also the customary payments for marriages, christnings, churchings, and burials. *Watf. c. 52.*

Concerning which, it is enacted by the statute of the 2 & 3 Ed. 6. c. 13. that all persons which by the laws or customs of this realm ought to make or pay their offerings, shall yearly well and truly content and pay the same to the parson, vicar, proprietor, or their deputies or farmers, of the parishes where they shall dwell or abide; and that, at such four offering days, as at any time heretofore within the space of four years last past hath been used and accustomed for the payment of the same; and in default thereof, to pay for the said offerings at easter then next following. *f. 10.*

The four offering days are christmalls, easter, whitfuntide, and the feast of the dedication of the parish church. *Gibf. 739.*

Concerning the offerings at easter; it is directed by the rubrick at the end of the communion office, that yearly at easter, every parishioner shall reckon with the parson, vicar, or curate, or his or their deputy or deputies, and pay to them or him all ecclesiastical duties, accustomedly due, then at that time to be paid.

And it hath been decreed, that easter offerings are due of common right, and not by custom only. *Burb. 173. 198.*

So in the case of *Carthew and Edwards, T. 1749*; it was decreed by the court of exchequer, that easter offerings were due to the plaintiff of common right, after the rate of 2d a head for every person in the defendant's family of 16 years of age and upwards, to be paid by the defendant.

Besides the oblations on the four principal festivals, there were occasional oblations upon particular services: of which there were some free and voluntary, which the parishioners or others were not bound to perform, but *ad libitum*; there were others by custom certain and obligatory, as those for marriages, christnings, churching of women, and burials. *Deg. p. 2. c. 23.*

Those offerings which were free and voluntary are now vanished, and are not comprehended within the aforesaid statute; but those that were customary and certain, as for communicants, marriages, christnings churching of women, and burials, are confirmed to the parish priests, vicars, and curates of the parishes where the parties live that ought to pay the same. *Deg. p. 2. c. 23.*

Particularly, at the burial of the dead, it was a custom for the surviving friends, to offer liberally at the altar, for the pious use of the priest, and the good estate of the soul of the deceased. *Ken. Par. Ant. Gloss.*

And from hence the custom still continueth in many places, of bestowing alms to the poor on the like occasions.

These oblations were anciently due to the parson of the parish, that officiated at the mother church or chapel that had parochial rites; but if they were paid to other chapels that had not any parochial rites, the

chaplains

Offerings.

chaplains thereof were accountable for the same to the parson of the mother church. *God. 427.*

By the statute of *circumspecte agatis*, 13 Ed. 1. *If a parson demand of his parishioners oblations due and accustomed, such demand shall be made in the spiritual court; in which case the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.*

But Sir Simon Degge conceiveth, that an action also may be formed upon the statute at the common law. *Deg. p. 2. c. 23.*

However, it is certain, that by the small tithe act of the 7 & 8 W. c. 6. offerings, oblations, and obventions may be recovered before the justices of the peace.

Official.

OFFICIAL *principal* is an officer, whose office is usually annexed to that of *Chancellor*; and is therefore treated of under that title.

There is also an official to the *archdeacon*; unto whom he standeth in the like relation, as the chancellor doth to the bishop.

Old Style. See *Kalendar*.

Option. See *Bishops*.

Oratory. See *Chapel*.

Ordinal.

ORDINAL, *ordinale*, was that book which *ordered* the manner of performing divine service: and seemeth to be the same which was called the *pie*, or *portuis*, and sometimes *portiforium*. *Lind. 251.*

Ordinary.

ORDINARY, *ordinarius* (which is a word we have received from the civil law), is he who hath the proper and regular jurisdiction, as of course and of common right; in opposition to persons who are *extraordinarily* appointed. *Swinb. 380.*

In some acts of parliament we find the bishop to be called ordinary, and so he is taken at the common law, as having ordinary jurisdiction in causes ecclesiastical; albeit in a more general acceptation, the word *ordinary* signifieth any judge authorized to take cognizance of causes in his own proper right, as he is a magistrate, and not by way of deputation or delegation. *God. 23.*

Ordination.

- I. *Of the order of priests and deacons in the church.*
- II. *Of the form of ordaining priests and deacons, annexed to the book of common prayer.*
- III. *Of the time and place for ordination.*
- IV. *Of the qualification and examination of persons to be ordained.*
- V. *Of oaths and subscriptions previous to the ordination.*
- VI. *Form and manner of ordaining deacons.*
- VII. *Form and manner of ordaining priests.*
- VIII. *Fees for ordination.*
- IX. *Simoniacal promotion to orders.*
- X. *General office of deacons.*
- XI. *General office of priests.*
- XII. *Exhibiting letters of orders.*
- XIII. *Archbishop Wake's directions to the bishops of his province, in relation to orders.*

I. *Of the order of priests and deacons in the church.*

2. **T**HE word *priest* is nearly the same in all the christian languages: Origin of the the Saxon is *preost*, the German *prister*, the Belgic *priester*, the words *priest* Swedish *prest*, the Gallic *prestre*, the Italian *prete*, the Spanish *preste*; all evidently enough taken from the Greek *πρεσβυτερος*. *Jun. Etym.*

In like manner, the word *deacon*, with little variation, runneth thro' all the same languages; deduced from the Greek *διακονος*. *id.*

2. *Art. 35.* Orders are not to be accounted for a sacrament of the Orders not a sacrament. gospel; as not having the like nature of sacraments with baptism and the lord's supper; for that they have not any visible sign or ceremony ordained of god.

Antiquity of
priests and
deacons in the
church.

3. *It is evident unto all men diligently reading the holy scripture and ancient authors, that from the apostles time there have been these orders of ministers in Christ's church; bishops, priests, and deacons. Which offices were evermore had in such reverend estimation, that no man might presume to execute any of them, except he were first called, tried, and examined, and known to have such qualities as are requisite for the same; and also by publick prayer with imposition of hands, were approved and admitted thereunto by lawful authority.* Preface to the forms of consecration and ordination.

Bishops, priests, and deacons] Besides these, the church of Rome hath five others; viz. *subdeacons, acolyths, exorcists, readers, and ostiaries.*

1. The *subdeacon*, is he who delivereth the vessels to the deacon, and assisteth him in the administration of the sacrament of the lord's supper. 2. The *acolyth*, is he who bears the lighted candle whilst the gospel is in reading, or whilst the priest consecrateth the host. 3. The *exorcist*, is he who adjureth evil spirits in the name of almighty god to go out of persons troubled therewith. 4. The *reader*, is he who readeth in the church of god, being also ordained to this, that he may preach the word of god to the people. 5. The *ostiary*, is he who keepeth the doors of the church, and tolleth the bell. These, tho' some of them ancient, were human institutions, and such as come not under the limitation which immediately precedes, [*from the apostles time*]; for which reason, and because they were evidently instituted for convenience only, and were not immediately concerned in the sacred offices of the church, they were laid aside by our first reformers. *Gibf. 99.*

That no man might presume to execute any of them] And to this purpose, the rule laid down in the canon law is, that if any person, not being ordained, shall baptize, or exercise any divine office, he shall for his rashness be cast out of the church, and never be ordained. *Gibf. 138.*

Except he were first called] Accordingly in the several offices, the person to be admitted is first examined by the archbishop or bishop, whether he thinks or is persuaded that he is truly called thereunto, according to the will of Christ, and the due order of this realm.

Tried, examined, and known] By the office of ordination, when the archdeacon or his deputy presenteth unto the bishop the persons to be ordained, the bishop says, "Take heed that the persons whom you present unto us, be apt and meet for their learning and godly conversation, to exercise their ministry duly to the honour of god and the edifying of his church". To which he answereth, "I have enquired of them, and also examined them, and think them so to be."

Imposition of hands] This was always a distinction between the three superior, and the five forementioned inferior orders; that the first were given by imposition of hands, and the second were not. *Gibf. 99.*

II. Of the form of ordaining priests and deacons, annexed to the book of common prayer.

1. In the liturgy established in the second year of king Edward the sixth, there was also a form of consecrating and ordaining of bishops, priests, and deacons; not much differing from the present form. Form established in the 2 Ed. 6.

2. Afterwards, by the 3 & 4 Ed. 6. c. 10. it was enacted, that *all books heretofore used for service of the church, other than such as shall be set forth by the king's majesty, shall be clearly abolished.* All other forms abolished. f. 1.

3. And by the 5 & 6 Ed. 6. c. 1. it is thus enacted: *The king, with the assent of the lords and commons in parliament, hath annexed the book of common prayer to this present statute; adding also a form and manner of making and consecrating of archbishops bishops priests and deacons, to be of like force and authority as the book of common prayer.* Form annexed to the book of common prayer. 5 & 6 Ed. 6. c. 1. f. 5.

8 El. c. 1.

4. And by Art. 36. The book of consecration of archbishops and bishops and ordering of priests and deacons, lately set forth in the time of Edward the sixth, and confirmed at the same time by authority of parliament, doth contain all things necessary to such consecration and ordering; neither hath it any thing, that of it self is superstitious and ungodly. And therefore whosoever are consecrated or ordered according to the rites of that book, since the second year of the forenamed king Edward unto this time, or hereafter shall be consecrated or ordered according to the same rites; we decree all such to be rightly, orderly, and lawfully consecrated and ordered. Established by the 39 articles.

5. And by Can. 8. Whosoever shall affirm or teach, that the form and manner of making and consecrating bishops priests and deacons, containeth any thing that is repugnant to the word of god; or that they who are made bishops priests or deacons in that form, are not lawfully made, nor ought to be accounted either by themselves or others to be truly either bishops priests or deacons, until they have some other calling to those divine offices; let him be excommunicated ipso facto, not to be restored, until he repent, and publicly revoke such his wicked errors. By canon.

6. And by the act of uniformity of the 13 & 14 C. 2. c. 4. it is enacted as followeth: *All ministers in every place of publick worship shall be bound to use the morning and evening prayer, administration of the sacraments, and all other the publick and common prayer, in such order and form as is mentioned in the book annexed to this present act, and intitled, The book of common prayer and administration of the sacraments, and other rites and ceremonies of the church of England; together with the psalter or psalms of David, pointed as they are to be sung or said in churches; and the form or manner of making ordaining and consecrating of bishops priests and deacons.* By act of parliament. f. 2.

And all subscriptions to be made to the thirty nine articles shall be construed to extend (touching the said thirty sixth article above recited), to the book containing the form and manner of making ordaining and consecrating of bishops priests

Ordination.

priests and deacons in this act mentioned, as the same did heretofore extend unto the book set forth in the time of king Edward the sixth. f. 30, 31.

III. Of the time and place for ordination.

Time.

1. By *Can. 31.* Forasmuch as the ancient fathers of the church, led by example of the apostles, appointed prayers and fasts to be used at the solemn ordering of ministers; and to that purpose allotted certain times, in which only sacred orders might be given or conferred: we, following their holy and religious example, do constitute and decree, that no deacons or *ministers* be made and ordained, but only upon the fundays immediately following jejunia quatuor temporum, commonly called ember-weeks, appointed in ancient time for prayer and fasting (purposely for this cause at their first institution), and so continued at this day in the church of England.

And by the preface to the forms of consecration and ordination, it is prescribed, that the bishop may at the times appointed in the canon, or else upon urgent occasion on some other funday or holiday in the face of the church, admit deacons and priests.

But this might not be done, at other times than is directed by the canon, at the sole discretion of the bishop; but he was to have the archbishop's dispensation or licence, as the practice was: and this was understood to be a special prerogative of the see of Rome in the times of popery. But as the rubrick made in the time of king Edward the sixth, and continued in the last revisal of the common prayer, seems to leave it to the judgment of the bishop, without any direction to have recourse to the archbishop; it may be a question, whether such dispensation be now necessary. *Gibf. 139.*

Place.

2. And this to be done in the cathedral, or parish church where the bishop resideth. *Can. 31.*

So that the bishop's jurisdiction as to conferring of orders is not confined to one certain place, but he may ordain at the parish church where he shall reside; and the Irish bishops do sometimes ordain in England: but, regularly, leave ought to be obtained of the bishop, within whose diocese the ordination is performed. *Johnf. 34.*

And this is agreeable to the rule of the ancient canon law; which directeth, that a bishop shall not ordain within the diocese of another, without the licence of such other bishop. *Gibf. 139.*

IV. Of the qualification and examination of persons to be ordained.

Age.

1. By *Can. 34.* No bishop shall admit any person into sacred orders, except he, desiring to be a *deacon*, is three and twenty years old; and to be a *priest*, four and twenty years compleat.

And by the preface to the form of ordination: None shall be admitted a deacon, except he be twenty three years of age, *unless he have a faculty;* and

and every man which is to be admitted a priest, shall be full four and twenty years old.

Unless he have a faculty] So that a faculty or dispensation is allowed, for persons of extraordinary abilities, to be admitted deacons sooner. *Gibf. 145.*

Which faculty (as it seemeth) must be obtained from the archbishop of Canterbury.

And by the statute of the 13 El. c. 12. *None shall be made minister, being under the age of four and twenty years.*

And in this case there is no dispensation. *Gibf. 146.*

Note, here it may be proper to observe once for all, the equivocal signification of the word *minister*, both in our statutes, canons, and rubrick in the book of common prayer. Oftentimes it is made to express the person officiating in general, whether priest or deacon: at other times it denoteth the priest alone, as contra-distinguished from the deacon; as particularly here in this statute, and in *Can. 31.* foregoing. And in such cases, the determination thereof can only be ascertained from the connexion and circumstances.

E. 1 Jac. 2. Roberts and Pain. A person being presented to the parish church of Christ-church in Bristol, was libelled against, because he was not twenty three years of age when made deacon, nor twenty four when made priest. A prohibition was prayed, upon this suggestion, that if the matter was true, a temporal loss, to wit, deprivation, would follow; and that therefore it was triable in the temporal court: But it was denied, because so it is also in the case of drunkenness and other vices, which are usually punished in the ecclesiastical courts, tho' temporal loss may ensue. *3 Mod. 67.*

2. *Otho.* Seeing it is dangerous to ordain any without a certain and true title; we do establish, that before the conferring of orders by the bishop, a diligent search and inquiry be made thereof. *Ath. 16.*

Can. 33. It hath been long since provided, by many decrees of the ancient fathers, that none should be admitted either deacon or priest, who had not first some certain place where he might use his function: According to which examples we do ordain, that henceforth no person shall be admitted into sacred orders, except (1) he shall at that time exhibit to the bishop, of whom he desireth imposition of hands, a presentation of himself to some ecclesiastical preferment then void in the diocese; or (2) shall bring to the said bishop a true and undoubted certificate, that either he is provided of some church within the said diocese where he may attend the cure of souls, or (3) of some minister's place vacant either in the cathedral church of that diocese, or in some other collegiate church therein also situate, where he may execute his ministry; or (4) that he is a fellow, or in right as a fellow, or (5) to be a conduit or chaplain in some college in Cambridge or Oxford; or (6) except he be a master of arts of five years standing, that liveth of his own charge in either of the universities; or (7) except by the bishop himself that doth ordain him minister, he be shortly after to be admitted either to some benefice or curateship then void.

Ordination.

And if any bishop shall admit any person into the ministry that hath none of these titles, as is aforesaid; then he shall keep and maintain him with all things necessary, till he do prefer him to some ecclesiastical living: And if the said bishop shall refuse so to do, he shall be suspended by the archbishop, being assisted with another bishop, from giving of orders by the space of a year.

No person &c.] By this branch of the canon, which is negative and exclusive, one sort of title that was heretofore very common, is in great measure taken away, viz. the title of his *patrimony*, which we meet with very frequently among the acts of ordination in our ecclesiastical records, and not only so, but the title of a *pension* or allowance in money, which is frequently specified; and sometimes the title of a *particular person* (of known abilities and there named) without any such specification of an annual sum. And at such titles, after the estate, sum, or the like, is often added in the acts of ordination (especially when it was small) that the party therewith acknowledged himself content; which declaration so made and entred, was understood to be a discharge of the bishop ordaining, from any obligation to provide for him. *Gibf. 140.*

In the cathedral church] This is only an affirmance of what was the law of the church before; the title of vicar *choral* being frequently entred as a canonical title, in the acts of ordination. *Gibf. 140.*

Or that he is a fellow] This also, as to fellows of colleges, appears to have been all along the law of the church of England, by the frequent entries of that title, as received and admitted in the acts of ordination. *Gibf. 140.*

Chaplain in some college] This seems to be a title founded on this canon, from the silence of the ancient books relating thereunto. *Gibf. 140.*

Master of arts of five years standing] This also seems to be a new title established by the canon. *Gibf. 140.*

Shall keep and maintain him] This was enjoined by a canon of the third council of Lateran; which canon was taken into the body of laws made in a council held at London, in the year 1200. And in the time of archbishop Winchelsey, there is in the register an order from the archbishop to one of his comprovincial bishops, to provide one of a benefice, whom he had ordained without title; and a citation of the executors of a bishop deceased, to oblige them to provide for one, whom the bishop had so ordained; and there is an order to a bishop, to oblige a clergyman, who had given a title of a certain annual sum, to pay it till the clerk should be provided for; and a citation to Merton college, to shew cause, why they should not be obliged to maintain one, to whom they had given a title at his ordination. In like manner, the observation of this canon made in the year 1603 (or rather of the common law of the church of which this canon is only an affirmance) was specially enforced upon the bishops by king Charles the first and archbishop Laud, upon this pain or
penalty

penalty of maintaining the person, if they should ordain any without such title. And in ancient times, the names of the persons who granted the titles were entred in the acts of ordination, as standing engaged; as a testimony against the person intitling, in case the clerk (ordained upon such title) should at any time want convenient maintenance. *Gibbs. 141.*

And whereas the laws of the church in this particular might be eluded, by a promise on the part of the person ordained, not to insist upon such maintenance; we find that case considered in the ancient Gloss, and there it seems to be determined, that the same being a publick right cannot be released. And before that, it had been made part of the body of the canon law, that persons having made such promise, unless compassionately dispensed withal, ought not to be admitted to a higher order, nor to minister in the order already taken. *id.*

In case of *letters dimissory*, the rule of the canon law is, that the bishop whose business it was to see that there was a good title, shall be liable to the penalty for a person ordained without sufficient title, altho' another bishop ordained such person. *id.*

3. By a constitution of *Otho*, it is thus enjoined: Seeing it is dangerous Testimonial. to ordain persons unworthy, void of understanding, illegitimate, irregular, and illiterate; we do decree, that before the conferring of orders by the bishop, strict search and inquiry be made of all these things. *Atton 16.*

And by a constitution of archbishop *Reynolds*; no simoniac, homicide, person excommunicate, usurer, sacrilegious person, incendiary, or falsifier, nor any other having *canonical impediment*, shall be admitted into holy orders. *Lind. 33.*

Canonical impediment] As, suppose, of *bigamy*; or any other which proceeds rather from defect than crime. *id.*

And by several constitutions of *Edmund* archbishop, the following impediments and offences are declared to be causes of suspension from orders received, and consequently so far forth are objections likewise, if known beforehand, against being ordained at all; viz.

They who are born of not lawful matrimony, and have been ordained without dispensation; shall be suspended from the execution of their office, till they obtain a dispensation:

They who have taken holy orders, in the conscience of any mortal sin, or for temporal gain only; shall not execute their office, till they shall have been expiated from the like sin by the sacrament of penance:

Again; all who appear to have contracted *irregularity* in the taking of orders, or before or after, unless dispensed withal by those who have power to dispense with the same; shall be suspended from the execution of their office, until they shall have lawful dispensations: By *irregulars* as to the premisses, we understand homicides, advocates in causes of blood, simonists, makers of simoniacal contracts; and who being infected with the contagion, have knowingly taken orders from hereticks, schismaticks, or persons excommunicated by name.

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Also bigamists, husbands of lewd women, violaters of virgins consecrated to god, persons excommunicate, and persons having taken orders surreptitiously, forcerers, burners of churches, and if there be any other of the like kind.

And he who did examine the parties, was to inquire into all these particulars. *Lind. 26.*

But this is not now required; but all the same, so far as they do concern a man's capacity, learning, piety, and virtue, are included in the following directions in the preface to the form of ordaining deacons, which is in some degree an enlargement of the foregoing restrictions: viz.

The bishop knowing, either by himself, or by sufficient testimony, any person to be a man of virtuous conversation, and without crime; and after examination and trial, finding him learned in the latin tongue, and sufficiently instructed in holy scripture, may admit him a deacon.

And by *Can. 34.* the direction is this: No bishop shall admit any person into sacred orders, except he hath taken some degree of school in either of the two universities; or at the least, except he be able to yield an account of his faith in latin according to the thirty nine articles.

And with respect unto *priest's* orders in particular, it is thus directed by the statute of the 13 El. c. 12. *None shall be made minister, unless it appear to the bishop that he is of honest life, and professeth the doctrine expressed in the thirty nine articles; nor unless he be able to answer, and render to the ordinary an account of his faith in latin, according to the said articles, or have special gift or ability to be a preacher.*

So that if these requisites be observed, those others are not now required, further than they do fall in with these.

And the ordinary way by which all this must appear to the bishop, must be by a written testimonial; concerning which it is directed by *Can. 34.* aforesaid, with respect both unto deacon's and priest's orders, that no bishop shall admit any person into sacred orders, except he shall then exhibit letters testimonial of his good life and conversation, under the seal of some college of Cambridge or Oxford, where before he remained, or of three or four grave ministers, together with the subscription and testimony of other credible persons, who have known his life and behaviour for the space of three years next before.

And with respect unto *priest's* orders in particular, it is enacted by the aforesaid statute of the 13 El. c. 12. that *none shall be made minister, unless he first bring to the bishop of that diocese, from men known to the bishop to be of sound religion, a testimonial both of his honest life, and of his professing the doctrine expressed in the thirty nine articles.*

Some of the canons abroad do further require, that proclamation be thrice made in the parish church where the person who offereth himself to be ordained inhabiteth, in order to know the impediments if any be; which the minister of such parish is to certify to the bishop or his official: Particularly, the council of Trent requires this, and that it be done by the command

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command of the bishop, upon signification made to him, a month before, of the name of the person who desires to be ordained: Not unlike to which is this clause in the articles of queen Elizabeth published in the year 1564, viz. "against the day of giving orders appointed, the bishop shall give open monitions to all men, to except against such as they know, not to be worthy, either for life or conversation." *Gibf.* 147.

Agreeable unto which are archbishop *Wake's* directions to the bishops of his province in the year 1716, subjoined at the end of this title, which altho' they have not the authority of a *law* properly so called, yet since it is said to be discretionary in the bishop whom he will admit to the order of priest or deacon, and that he is not obliged to give any reason for his refusal (1 *Still.* 334. *Johns.* 46. *Wood b.* 1. c. 3.) this implieth, that he may insist upon what previous terms of qualification he shall think proper, consistent with law and right. And by the statute, rubrick, and canon aforegoing, he is not required, but permitted only, to admit persons so and so qualified; and prohibited to admit any without, but not enjoined to admit any persons altho' they have such and such qualifications.

4. By *Can.* 35. The bishop, before he admit any person to holy orders, shall diligently examine him, in the presence of those ministers that shall assist him at the imposition of hands; and if the bishop have any lawful impediment, he shall cause the said ministers carefully to examine every such person so to be ordered. And if any bishop or suffragan shall admit any to sacred orders who is not so examined, and qualified as before we have ordained [*viz.* in *Can.* 34.]; the archbishop of his province having notice thereof, and being assisted therein by one bishop, shall suspend the said bishop or suffragan so offending, from making either deacons or priests for the space of two years. Examination:

Of common right, this examination pertaineth to the archdeacon, saith *Lindwood*; and so saith the canon law, in which this is laid down, as one branch of the archidiaconal office. Which thing is also supposed in our own form of ordination, both of priests and deacons, where the archdeacon's office is to present the persons that are apt and meet. *Gibf.* 147.

And for the regular method of examination, we are referred by *Lindwood*, to the canon upon that head, inserted in the body of the canon law; viz. When the bishop intends to hold an ordination, all who are desirous to be admitted into the ministry, are to appear on the fourth day before the ordination; and then the bishop shall appoint some of the priests attending him, and others skilled in the divine law, and exercised in the ecclesiastical functions, who shall diligently examine the life, age, and title of the persons to be ordained; at what place they had their education; whether they be well learned; whether they be instructed in the law of god. And they shall be diligently examined for three days successively; and so on the saturday, they who are approved, shall be presented to the bishop. *Gibf.* 147.

5. By

Letters dimissory.

5. By a constitution of archbishop *Reynolds*: Persons of religion shall not be ordained by any but their own bishop, without letters dimissory of the said bishop; or, in his absence, of his vicar general. *Lind.* 32.

And by *Can.* 34. No bishop shall henceforth admit any person into sacred orders, which is not of his own diocese, except he be either of one of the universities of this realm, or except he shall bring letters dimissory from the bishop of whose diocese he is.

Of one of the universities] That is, a member of some college, so as that he may be ordained *ad titulum collegii sui*. *Grey.* 45.

In the ancient acts of ordination, the fellows of New-college, St. Mary Winton, and King's college in Cambridge, are mentioned, as possessed of a special privilege from the pope, to be ordained by what bishops they pleased; and they are said to be *sufficiensiter dimissi*, in virtue of that privilege, and without letters dimissory. But it doth not appear by our books, that this was then that general right of all colleges in the two universities, to which they are intitled by virtue of this canon. *Gibf.* 142.

And by a constitution of *Richard Wethershed*, archbishop of Canterbury; A bishop ordaining one of another diocese, without special licence of the bishop of that diocese, shall be suspended from the conferring of that order to which he shall ordain any such person, until he shall have made a proper satisfaction. *Lind.* 32.

And by *Can.* 35. If any bishop or suffragan shall admit any to sacred orders, who is not so qualified ——— as before we have ordained, the archbishop of his province, having notice thereof, and being assisted therein by one bishop, shall suspend the said bishop or suffragan so offending, from making either deacons or priests, for the space of two years: (and by the ancient canon law, from granting letters dimissory to the persons of his diocese who are to be ordained. *Gibf.* 143.)

And they who shall be promoted to holy orders, by other than their own bishop, without licence of their own bishop, shall be suspended from the exercise of such order, until they shall obtain a dispensation. *Edm. Lindw.* 26.

But a dispensation in such case by their own bishop shall be sufficient, who may ratify such ordination. *Lindw.* 26.

And in our ecclesiastical records, we find several persons dispensed with, in form, for obtaining orders without such letters, as a great irregularity; which was looked upon as needful for the ratification of the order received. *Gibf.* 142.

The archbishop, as metropolitan, may not grant letters dimissory; but this is to be understood with an exception to the time of his metropolitanical visitation of any dioceses, during which he may both grant letters dimissory, and ordain the clergy of the diocese visited. *Gibf.* 143.

So neither the archdeacon, nor official, may grant letters dimissory. Concerning the archdeacon, the canon law is express: And as to the officials, they are excluded by the same constitution that excludes the religious; and the ancient gloss, speaking of officials, says, Altho' it cannot be denied

nied that they have ordinary jurisdiction, yet recourse is not to be had to them in every thing,—for they cannot grant letters commendatory for orders. *Gibf. 143.*

During the *vacancy* of any see; the right of granting letters dimissory within that see, rests in the guardian of the spiritualties; and, in consequence, the right of ordaining also, where such guardian is of the episcopal order. *Gibf. 143.*

A bishop being in parts *remote*; he who is specially constituted vicar general for that time, hath power to grant letters dimissory; and the reason is, because during that time the whole episcopal jurisdiction is vested in him: as it is also in persons who enjoy jurisdictions entirely exempt from the bishop, and who therefore may likewise grant them. *Gibf. 143.*

The persons *to whom* letters dimissory may be granted by any bishop, are either such who were born in the diocese, or are promoted in it, or are resident in it. This appears from *Lindwood*, in his commentary upon the foregoing constitution of archbishop *Reynold*; whose observation is taken from the body of the canon law. But altho' this is laid down disjunctively, so as letters dimissory granted in any of the three cases will be good; yet it appears in practice, that heretofore they were judged to come more properly from the bishop in whose diocese he was promoted, or in which his title lay. And the reason was, because the bishop in whose diocese the person was born, or had long dwelt, is presumed to have the best opportunity of knowing the conversation of the person to be ordained. *Gibf. 143.*

The *fitness* of the persons to be ordained (as to life, learning, title, and the like) ought to appear, before the granting of letters dimissory. This is supposed (as to conversation at least) in what hath been said before; and as to the title, it was not only inquired into by the bishop granting the letters, but frequently remained with him; of which special notice was taken in the body of such letters. And the bishop who grants the letters dimissory is to make this inquiry, and not the bishop to whom such letters are transmitted; for he is to presume that the persons recommended to him are fit and sufficient. *Gibf. 144.*

Letters dimissory may be granted at once to *all orders*, and directed to any catholick bishop at large. And this hath been the practice in the church of England, both before and since the reformation; as appears by innumerable instances, in the acts of ordination, of *literæ dimissoriæ ad omnes*; and by the forms of the letters dimissory (whether *ad omnes* or not) which are directed in that general style. But other churches, to prevent the inconveniences of this practice (especially where such letters are granted without previous examination), have expressly forbid them both. *Gibf. 144.*

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V. Of oaths and subscriptions previous to the ordination.

1. By the 1 El. c. 1. and 1 W. c. 8. *Every person taking orders, before he shall receive or take any such orders, shall take the oaths of allegiance and supremacy, before the ordinary or commissary.*

2. And by the 13 El. c. 12. *None shall be admitted to the order of deacon, or ministry; unless he shall first subscribe to the thirty nine articles. 1. 5.*

3. And by Can. 36. *No person shall be received into the ministry, except he shall first subscribe to these articles following.*

(1) That the king's majesty, under god, is the only supreme governor of this realm, and of all other his highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes, as temporal; and that no foreign prince, person, prelate, state, or potentate hath, or ought to have any jurisdiction, power, superiority, preheminance or authority, ecclesiastical or spiritual, within his majesty's said realms, dominions, and countries.

(2) That the book of common prayer, and of ordering of bishops, priests, and deacons, containeth in it nothing contrary to the word of god, and that it may lawfully be used, and that he himself will use the form in the said book prescribed in publick prayer, and administration of the sacraments, and none other.

(3) That he alloweth the book of articles of religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in the convocation holden at London, in the year of our lord god one thousand five hundred sixty and two; and that he acknowledgeth all and every the articles therein contained, being in number nine and thirty, besides the ratification, to be agreeable to the word of god.

Which subscription, as it seemeth by the same and the following canon, must be before the bishop himself.

And for the avoiding of all ambiguities, such person shall subscribe in this form and order of words, setting down both his christian and surname, viz. "I N. N. do willingly and ex animo subscribe to these three articles, above mentioned, and to all things that are contained in them." Can. 36.

And if any bishop shall ordain any, except he shall first have so subscribed; he shall be suspended from giving of orders for the space of twelve months. Can. 36.

VI. Form and manner of ordaining deacons.

1. The ordination (as well of deacons as of ministers) shall be performed in the time of divine service, in the presence not only of the archdeacon, but of the dean and two prebendaries at the least, or (if they shall happen by any lawful cause to be let or hindered) in the presence of four other grave persons, being masters of arts at the least, and allowed for publick preachers. Can. 31.

And

And by the statute of the 21 H. 8. c. 13. for pluralities; it is alledged as one reason why a bishop may retain six chaplains, because he must occupy six chaplains at the giving of orders. *f. 24.*

However, in practice, a less number than is required either by the said statute or by the aforefaid canon, is sometimes admitted; and this (as it is said) by virtue of the rubrick in the office of ordination, which directeth *that the bishop with the priests present shall lay their hands upon the persons to be ordained*; implying, as is supposed, that if there are but two priests present, it sufficeth by this rubrick, which is established by the act of parliament of the 13 & 14 C. 2. But the words do not seem so much to be restrictive of the number before required, as directory what that number as by law before required in this respect shall do.

2. And at the time of ordination, the bishop shall say unto the people, Brethren, if there be any of you, who knoweth any impediment, or notable crime, in any of these persons presented to be ordered deacons, for the which he ought not to be admitted to that office; let him come forth in the name of god, and shew what the crime or impediment is. *Form of ordination.*

And if any great crime or impediment be objected, the bishop shall surcease from ordering that person, until such time as the party accused shall be found clear of that crime. *id.*

3. And before the gospel, the bishop sitting in his chair, shall cause the said oaths of allegiance and supremacy to be (again) ministered unto every of them that are to be ordered. *Form of ordin. 1 W. c. 8.*

4. Then the bishop, laying his hands severally upon the head of every one of them, humbly kneeling before him, shall say, "Take thou authority to execute the office of a deacon in the church of god committed unto thee; in the name of the father, and of the son, and of the holy ghost. Amen."

Then shall the bishop deliver to every one of them the new testament, saying, "Take thou authority to read the gospel in the church of god, and to preach the same, if thou be thereto licensed by the bishop himself." *Form of ordin.*

5. Finally, it must be declared unto the deacon, that he must continue in that office of a deacon the space of a whole year (except for reasonable causes it shall otherwise seem good unto the bishop), to the intent he may be perfect, and well expert in the things appertaining to the ecclesiastical administration; in executing whereof, if he be found faithful and diligent, he may be admitted by his diocesan to the order of priesthood. *Form of ordin.*

VII. Form and manner of ordaining priests.

1. *Can. 32.* The office of a deacon being a step or degree to the ministry, according to the judgment of the ancient fathers and the practice of the primitive church, we do ordain and appoint, that hereafter no bishop shall make any person, of what qualities or gifts soever, a deacon

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and a minister both together upon one day; but the order in that behalf prescribed, in the book of making and consecrating bishops priests and deacons, be strictly observed. Not that always every deacon should be kept from the ministry for a whole year, when the bishop shall find good cause to the contrary; but that there being now four times appointed in every year for the ordination of deacons and ministers, there may ever be some time of trial of their behaviour in the office of deacon, before they be admitted to the order of priesthood.

2. At the time of ordination, the bishop shall say unto the people; Good people these are they whom we purpose, god willing, to receive this day unto the holy office of priesthood: for after due examination, we find not to the contrary but that they be lawfully called to their function and ministry, and that they be persons meet for the same. But yet if there be any of you, who knoweth any impediment, or notable crime in any of them, for the which he ought not to be received into this holy ministry, let him come forth in the name of god, and shew what the crime or impediment is.

And if any great crime or impediment be objected, the bishop shall surcease from ordering that person, until such time as the party accused shall be found clear of that crime. *Form of ordin.*

3. Then the bishop, sitting in his chair, shall minister to every one of them the oaths aforesaid of allegiance and supremacy. *id.* 1 *W.* c. 8.

4. Then the bishop, *with the priests present*, shall lay their hands severally upon the head of every one that receiveth the order of priesthood; the receivers humbly kneeling upon their knees, and the bishop saying, "Receive the holy ghost for the office and work of a priest in the church of god, now committed unto thee by the imposition of our hands: Whose sins thou dost forgive, they are forgiven; and whose sins thou dost retain, they are retained. And be thou a faithful dispenser of the word of god, and of his holy sacraments: In the name of the father, and of the son, and of the holy ghost."

Then the bishop shall deliver to every one of them kneeling, the bible into his hand, saying, "Take thou authority to preach the word of god, and to minister the holy sacraments in the congregation, where thou shalt be lawfully appointed thereunto."

With the priests present] By *Can.* 35. They who assist the bishop in laying on of hands, shall be of the cathedral church, if they may be conveniently had, or other sufficient preachers of the same diocese, to the number of three at the least.

VIII. Fees for ordination.

1. By a constitution of archbishop *Stratford*: For any letters of orders, the bishops clerks or secretaries shall not receive above 6d; and for the sealing of such letters, or to the *marshals of the bishop's house* for admittance, to *porters, hostiaries, or shawers*, nothing shall be paid: on pain of

of rendring double within a month; and for default thereof, the offender, if he is a clerk beneficed, shall be suspended from his office and benefice; if he is not beneficed, or a lay person, he shall be prohibited from the entrance of the church till he comply. *Lind. 222.*

Marshals] They who govern the hall and inner Parts of the house. *Lind. 222.*

Hostiaries] Lindwood understandeth this word to signify the same as *ostiaries*, or persons appointed to keep the *doors*, and the word *janitores* (*porters*) next aforegoing to signify those who keep the *gates*; whereas, more properly, it seemeth that *janitores* (or *porters*) doth express both of these; and that the word *hostiarij* (as Dr. *Gibson* observeth) doth denote those persons who prepared the *host*: for there is in the Roman pontifical a rubrick in the ordination of priests, that the bishop shall deliver to the person to be ordained, the cup with wine and water, and the paten laid upon it with the host, the bishop saying unto him, Take thou authority to offer sacrifice to god, and to celebrate mass as well for the living as for the dead, in the name of god. *Gibf. 153.*

Shavers] Whose office was, to shave the crowns of persons to be ordained. *Lindw. 222.*

2. And by *Can. 135.* No fee or money shall be received either by the archbishop or any bishop or suffragan, either directly or indirectly, for admitting any person into sacred orders; nor shall any other person or persons under the said archbishop bishop or suffragan, for parchment, writing, wax, sealing, or any other respect thereunto appertaining, take above 10s: under such pains as are already by law prescribed.

Or any other respect thereunto appertaining — above 10s.] It is not lawful, saith *John de Athen*, to give any thing to the notary performing the duty of his office in the act of ordination; nevertheless he says, it is otherwise as to that notary or register who writes letters testimonial for those that are ordained, for his just salary, or somewhat more for his extraordinary trouble; altho' this may more securely be given voluntarily, without a preceding compact. *Otho. De scrutin. ordin. v. Scriptura.*

And some of the modern constitutions abroad agreeing to the reasonableness of this, have by way of restraint upon the officer, fixed the fee of writing and the other particulars, in like manner as this canon and the foregoing constitution of archbishop *Stratford* have done in our church. For the *letters testimonial* of ordination are no part of the ordination, but only taken afterwards for the security of the person ordained; and therefore the same *John de Athen*, in the place abovementioned says, It is *safe* (not, *necessary*) for the persons ordained, to have with them the said writing or letters testimonial of ordination, under the bishop's seal, containing the names of the person ordaining and of the person ordained, and the taking of such orders, and the time and place of ordination, and the like. *Gibf. 154.*

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IX. Simoniacal promotion to orders.

By the 31 El. c. 6. If any person shall receive or take any money fee reward or any other profit directly or indirectly, or shall take any promise agreement covenant bond or other assurance to receive or have any money fee reward or any other profit directly or indirectly, either to himself or to any other of his friends, (all ordinary and lawful fees only excepted,) for or to procure the ordaining or making of any minister, or giving of any orders, or licence to preach; he shall forfeit 40*l.* and the person so corruptly ordained 10*l.* and if at any time within seven years next after such corrupt entering into the ministry or receiving of orders, he shall accept any benefice or promotion ecclesiastical, the same shall be void immediately upon his induction investiture or installation, and the patron shall present or collate or dispose of the same as if he were dead: one moiety of which forfeitures to be to the king, and the other to him that shall sue. *f.* 10.

X. General office of deacons.

It appertaineth to the office of a deacon, in the church where he shall be appointed to serve, to assist the priest in divine service, and specially when he ministrETH the holy communion, and to help him in the distribution thereof, and to read holy scriptures, and homilies in the church; and to instruct the youth in the catechism; in the absence of the priest to baptize infants; and to preach if he be licensed thereto by the bishop himself: And furthermore it is his office, where provision is so made, to search for the sick poor and impotent people of the parish, and to intimate their estates names and places where they dwell, unto the curate; that by his exhortation they may be relieved with the alms of the parishioners or others. Rubr. in the form of ordin.

To assist the priest in divine service] Anciently, he officiated under the presbyter, in saying responses, and repeating the confession, the creed, and the lord's prayer after him, and in such other duties of the church as now properly belong to our parish clerks; who were heretofore real clerks, attending the parish priest in those inferior offices. *Gibf.* 150.

And specially when he ministrETH the holy communion] But by the 13 & 14 C. 2. c. 4. No person shall presume to consecrate the sacrament of the lord's supper, before such time as he shall be ordained priest; on pain of 100*l.* half to the king, and half to be equally divided between the poor of the parish where the offence shall be committed and him who shall sue in any of his majesty's courts of record; and to be disabled from being admitted to the order of priest for one whole year then next following. *f.* 14.

But this not to extend to foreigners or aliens of the foreign reformed churches allowed by the king. *f.* 15.

Also, by the act of toleration, this shall not extend to qualified protestant dissenting ministers.

And

And to read the holy scriptures] This power is expressly given to him in the act of ordination before mentioned.

To search for the sick, poor, and impotent] This is the most ancient duty of a deacon, and the immediate cause of the institution of the order. This rule was made in England while the poor subsisted wholly by voluntary charities, and before the settlement of rates or other fixed and certain provisions; pursuant to which provision, our laws have devolved that care upon the churchwardens and overseers of the poor; which last office was created on purpose for that end. *Gibf.* 150.

And to intimate their estates, names, and places where they dwell, unto the curate] That is, to the rector or vicar, who hath the *cure* of souls.

And here it is obvious to remark the ambiguity of the word *curate*, as was before observed of the word *minister*: sometimes it expresseth the person, whether priest or deacon, who officiateth under the rector or vicar, employed by him as his assistant, or to supply the place in his absence; sometimes it denoteth the person officiating in general, whether he be rector, vicar, or assistant curate, or whosoever performeth the service for that time; sometimes it denoteth exclusively (as in this place) the rector, vicar, or person beneficed, who hath *curam animarum*.

So far the office of a deacon is to be collected from the rubrick in the form of ordination, and from the form it self. And forasmuch as he is hereby permitted to baptize, to catechize, to preach, to assist in the administration of the lord's supper; so also by parity of reason he hath used to solemnize matrimony, and to bury the dead. *Watf.* c. 14.

And in general it seemeth, that he may perform all the other offices in the liturgy, which a priest can do, except only consecrating the sacrament of the lord's supper (as hath been said), and except also the pronouncing of the *absolution*.

Indeed it is not clear from the rubrick in the book of common prayer; whether, or how far, a deacon is prohibited thereby to pronounce the absolution. For altho' it is there directed, that the same shall be pronounced by the *priest alone*; yet the word [*alone*] in that place seemeth only to intend, that the people shall not pronounce the absolution after the priest, as they did the confession just before: and the word *priest*, throughout the rubrick, doth not seem to be generally appropriated to a person in priest's orders only; on the contrary, almost immediately after it is directed, that the *priest* shall say the gloria patri, and then afterwards that the *priest* shall say the suffrages after the lord's prayer (which, by the way, in most of the occasional offices are called by mistake the suffrages *after the creed*, or the suffrages *next after the creed*), and it is not supposed that these expressions are to be understood of the *priest* alone, exclusive of a *deacon* who may happen to perform the service. And here also we may observe the ambiguous signification of the word *priest*, as before was observed of the words *minister* and *curate*: sometimes it is understood

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derstood to signify a person in priest's orders only; at other times, and especially in the rubrick, it is used to signify the person officiating whether he be in priest's or only in deacon's orders: and in general, the words *priest*, *minister*, and *curate* seem indiscriminately to be applied throughout the liturgy, to denote that clergyman who is officiating, whether he be rector, vicar, assistant curate, priest, or deacon.

But the argument to evince that the priest only, and not a deacon, hath power to pronounce the absolution, seemeth most evidently to be deduced from the acts of ordination before mentioned. To the *deacon*, it is said; "Take thou authority to read the gospel, and to preach." To the *priest*, it is said, "Receive the holy ghost ——— Whose sins thou dost forgive, they are forgiven; and whose sins thou dost retain, they are retained."

Moreover; until a person is admitted to the order of priesthood, he is not capable of any benefice or ecclesiastical promotion. *Gibf.* 146.

And by the statute of the 13 & 14 C. 2. c. 4. no person shall be capable to be admitted to any parsonage vicarage benefice or other ecclesiastical promotion or dignity, before he be ordained priest; on pain of 100l. half to the king, and half to be equally divided between the poor and the informer. *f.* 14.

Neither is a person that is merely a layman, or that is only a deacon, capable of a *donative*: for altho' that he who hath a donative may come into the same by lay donation, and not by admission and institution; yet his function is spiritual. *1 Inst.* 344.

So that he who is no more than a deacon, can only use his orders either as a chaplain to some family, or as a curate to some priest, or as a lecturer without title: for the prebendaries of some prebends in cathedral and collegiate churches, are to read lectures there, by the appointment of the founders thereof, and may from thence be called lecturers; but these places are of the number of ecclesiastical promotions, to which the incumbents are admitted by collation or institution, of which a deacon as aforesaid is not therefore capable; yet the king's professor of the law within the university of Oxford, may have and hold the prebend of Shipton within the cathedral church of Sarum, united and annexed to the place of the same king's professor for the time being, altho' that the said professor be but a layman. *Watf. c.* 14. *13 & 14 C. 2. c. 4. f.* 29.

XI. General office of priests.

A priest by his ordination receiveth authority to preach the word of god, and to consecrate and administer the holy communion, in the congregation where he shall be lawfully appointed thereunto.

Yet notwithstanding, by *Can.* 36. he may not preach without a licence either of the archbishop, or of the bishop of the diocese where he is placed, under their hands and seals, or of one of the two universities under their seals likewise.

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But a licence by the bishop of any diocese is sufficient, altho' it be only to preach within his diocese; the statute not requiring any licence by the bishop of the diocese where the church is. *Watf. c. 14.*

Dr. Watson says, that if a person, who is a mere layman, be admitted and instituted to a benefice with cure, and doth administer the sacrament, marry, and the like; these, and all other spiritual acts performed by him during the time he continues parson in fact, are good; so that the persons baptized by him are not to be re-baptized, nor persons married by him to be married again, to satisfy the law. *Watf. c. 14. Cro. El. 775.*

XII. Exhibiting letters of orders.

1. *Can. 137.* Every parson, vicar, and curate, shall at the bishop's first visitation, or at the next visitation, after his admission, shew and exhibit unto him his letters of orders, to be by him either allowed, or (if there be just cause) disallowed and rejected; and being by him approved, to be signed by the register; the whole fees for which, to be paid but once in the whole time of every bishop, and afterwards but half the said fees.

2. *Arund.* No curate shall be admitted to officiate in another diocese, unless he bring with him his letters of orders.

3. *Can. 39.* No bishop shall institute any to a benefice, who hath been ordained by any other bishop, except he first shew unto him his letters of orders.

4. By the 4 *H. 7. c. 13.* If any person at the second time of asking his clergy, because he is within orders, hath not there ready his letters of orders, or a certificate of his ordinary witnessing the same; the justices afore whom he is arraigned, shall give him a day to bring in his said letters or certificate; and if he fail in so doing, he shall lose the benefit of his clergy, as he shall do that is without orders.

XIII. Archbishop Wake's directions to the bishops of his province, in relation to orders.

It is judged proper here to subjoin archbishop Wake's letter to the bishops of the province of Canterbury, dated June 5. 1716. which altho' it concerneth other matters besides those of ordination, yet since the duty of conferring of orders appeareth to be the principal regard thereof it seemeth best to insert the same intire in this place; and to refer to it here at large from those other titles, unto which it hath some relation.

As to its authority, it is certain (as hath been observed before) that in it self it hath not the force of law, nor is it so intended, or to be of any binding obligation to the church, further than the archbishops and bishops from time to time shall judge expedient; I mean, as to those parts of it which only concern matters that the law hath left indefinite, and discretionary in the archbishops and bishops. Other parts thereof are only enforcements of what was the law of the church before; and those,

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without doubt, are of perpetual obligation; not by the authority of these injunctions, but by virtue of the laws upon which they are founded.

My very good lord,

Being by the providence of god called to the metropolitical see of this province, I thought it incumbent upon me to consult as many of my brethren the bishops of the same province, as were here met together during this session of parliament, in what manner we might best employ that authority which *the ecclesiastical laws now in force, and the custom and laws of this realm*, have vested in us, for the honour of god, and for the edification of his church, committed to our charge: And upon serious consideration of this matter, we all of us agreed in the same opinion, that we should, by the blessing of god upon our honest endeavours, in some measure promote these good ends, by taking care (as much as in us lieth) that no unworthy persons might hereafter be admitted into the sacred ministry of the church; nor any be allowed to serve as curates, but such as should appear to be duly qualified for such an employ; and that all who officiated in the room of any absent ministers, should reside upon the cures which they undertook to supply; and be ascertained of a suitable recompence for their labours.

In pursuance of those resolutions, to which we unanimously agreed, I do now very earnestly recommend to you;

(I) *That you require of every person who desires to be admitted to holy orders, that he signify to you his name and place of abode, and transmit to you his testimonial, and a certificate of his age duly attested, with the title upon which he is to be ordained at least twenty days before the time of ordination; and that he appear on Wednesday, or at farthest on Thursday in ember-week, in order to his examination.*

(II) *That if you shall reject any person, who applies for holy orders, upon the account of immorality proved against him, you signify the name of the person so rejected, with the reason of your rejecting him, to me, within one month; that so I may acquaint the rest of my suffragans with the case of such rejected person before the next ordination.*

(III) *That you admit not any person to holy orders, who having resided any considerable time out of the university, does not send to you, with his testimonial, a certificate signed by the minister, and other credible inhabitants of the parish where he so resided, expressing that notice was given in the church, in time of divine service, on some sūnday, at least a month before the day of ordination, of his intention to offer himself to be ordained at such a time; to the end that any person who knows any impediment, or notable crime, for which he ought not to be ordained, may have opportunity to make his objections against him.*

(IV) *That you admit not letters testimonial, on any occasion whatsoever, unless it be therein expressed, for what particular end and design such letters are granted; nor unless it be declared by those who shall sign them, that they have personally known the life and behaviour of the person for the time by them certified;*

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certified; and do believe in their conscience, that he is qualified for that order, office, or employment, to which he desires to be admitted.

(V) That in all testimonials sent from any college or hall, in either of the universities, you expect that they be signed, as well as sealed; and that among the persons signing, the governor of such college or hall, or in his absence, the next person under such governor, with the dean, or reader of divinity, and the tutor of the person to whom the testimonial is granted, (such tutor being in the college, and such person being under the degree of master of arts,) do subscribe their names.

(VI) That you admit not any person to holy orders upon letters dimissory, unless they are granted by the bishop himself, or guardian of the spiritualities *sede vacante*; nor unless it be expressed in such letters, that he who grants them, has fully satisfied himself of the title and conversation of the person to whom the letter is granted.

(VII) That you make diligent inquiry concerning curates in your diocese, and proceed to ecclesiastical censures against those who shall presume to serve cures without being first duly licensed thereunto; as also against all such incumbents who shall receive and employ them, without first obtaining such licence.

(VIII) That you do not by any means admit of any minister, who removes from any other diocese, to serve as a curate in yours, without testimony of the bishop of that diocese, or ordinary of the peculiar jurisdiction from whence he comes, in writing, of his honesty, ability, and conformity to the ecclesiastical laws of the church of England.

(IX) That you do not allow any minister to serve more than one church or chapel in one day, except that chapel be a member of the parish church, or united thereunto; and unless the said church or chapel where such a minister shall serve in two places, be not able in your judgment to maintain a curate.

(X) That in the instrument of licence granted to any curate, you appoint him a sufficient salary, according to the power vested in you by the laws of the church, and the particular direction of a late act of parliament for the better maintenance of curates.

(XI) That in licences to be granted to persons to serve any cure, you cause to be inserted, after the mention of the particular cure provided for by such licences, a clause to this effect [or in any other parish within the diocese, to which such curate shall remove with the consent of the bishop.]

(XII) That you take care, as much as is possible, that whosoever is admitted to serve any cure, do reside in the parish where he is to serve; especially in livings that are able to support a resident curate: and where that cannot be done, that they do at least reside so near to the place, that they may conveniently perform all their duties both in the church and parish.

These, my lord, were the orders and resolutions, to which we all agreed; and which I do hereby transmit to you; desiring you to communicate them to the clergy of your diocese, with an assurance that you are resolved, by the grace of god, to direct your practice in these particulars,

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agreeably thereunto. And so commending you to the blessing of god in these, and all your other pious endeavours, for the service of his church, I heartily remain,

my very good lord,
your truly affectionate brother,
W. CANT.

(I) *That you require of every person &c.*] By this first article six things are required: viz.

(1) *That he signify to you his name and place of abode*] It may be so ordered, that this shall be set forth in the testimonial, or title, or both; but it seemeth rather, that by this article a distinct instrument is required for the signification thereof.

(2) *And transmit to you his testimonial*] According to the 34th canon, and the fourth and fifth articles of these directions.

(3) *And a certificate of his age duly attested*] That is, from the register book, under the hands of the minister and churchwardens of the parish where he was baptized; or, where that cannot be had, by other sufficient testimony.

(4) *With the title upon which he is to be ordained*] According to the tenor of the thirty third canon before mentioned.

(5) *At least twenty days before the time of ordination*] By the canons aforesaid, the title and testimonial are required to be exhibited at the time of ordination: but by these directions, they are to be transmitted for so long time before, as that there may be opportunity to make inquiry, if needful, into any of the particulars therein contained.

(6.) *And that he appear on Wednesday, or at farthest on Thursday in ember-week*] This is agreeable to the canon law before-mentioned out of Lindwood, that he shall appear on the fourth day before the ordination.

(II) *That if you shall reject &c.*] This second article, of signifying the names of persons rejected for immorality to the archbishop, is a prudent caution; and was not provided for before by any law.

(III) *That you admit not any person &c.*] This article, concerning notice to be given in the church, is also a reasonable provision, and agreeable to foreign practice (as hath been observed); altho' not particularly enjoined by any law of our church.

In the present directions, as delivered by the archbishops of late years, there is an alteration in this article: Instead of the expression, that the minister and others shall certify "that notice was given in the church of his intention to offer himself to be ordained at such a time, to the end that any person who knows any impediment or notable crime, for the which he ought not to be ordained, may have opportunity to make his objections against him," (that is, to the bishop, as it seemeth;) — it now runs,

runs, that they shall certify "that such notice was given, and that upon such notice given no objections have come to their knowledge, for the which he ought not to be ordained," (which implies the objections to be notified to the persons signing the certificate.)

(IV) *That you admit not letters testimonial &c.]* This and the next article concerning testimonials, are supplementary to the thirty fourth canon; and for their obligation do depend on these injunctions, and not on any fixed law; and therefore may be varied from time to time, as the archbishops and bishops shall see cause.

(V) *That in all testimonials sent from any college &c.]* By the canon, the common seal only of the college was required, which indeed of it self (as in all other bodies corporate) doth imply a consent of the major part of the society: This article doth further require a *quorum* (as it were); namely, that of the said major part, the head of the college, the dean, and the tutor, be three; and the same to appear by the subscription of their names. So that ordinarily it seemeth to be in the power of any one of those three, to prohibit any person of their college from being ordained; which thing perhaps may require some farther consideration. And it is much to the honour of the universities, that for so long time there have been no instances of the abuse of this power.

(VI) *That you admit not any person into holy orders upon letters dimissory &c.]* This article concerning letters dimissory, is only an admonition to put in due execution, what was the law of the church before.

(VII) *That you make diligent inquiry concerning curates in your diocese who shall presume to serve cures without being first duly licensed.]* The substance of this article, concerning the licensing of curates, was enjoined before by several canons of the church.

(VIII) *That you do not by any means admit of any minister, who removes from another diocese, to serve as a curate in yours, without testimony of the bishop of that diocese, of his honesty, ability, &c.]* This article, concerning curates bringing testimonials from other dioceses, is nearly in the words of the forty eighth canon.

In the present rules, instead of the word *honesty* (which is taken from the canon), are inserted the words *good life*.

(IX) *That you do not allow any minister to serve more than one church or chapel in one day.]* This article also is in the words of the forty eighth canon.

(X) *That in the instrument of licence granted to any curate, you appoint him a sufficient salary, according to the power vested in you by the laws of the church.]* There seemeth to be no particular law of the church, by which any certain sum is limited for the stipend of curates in general, but such as are obsolete and ineffectual by reason of the great alteration in the value of money. But the ordinary may refuse to license the curate, unless the incumbent shall in his nomination and appointment promise to pay unto the curate such a certain annual sum.

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And the particular direction of a late act of parliament] Which act is that of the 12 An. st. 2. c. 12. for the curates of non-residents only; by which the ordinary hath power, according to the value of the living and the difficulty of the cure, to appoint a salary not exceeding fifty pounds a year, nor less than twenty.

(XI) The clause to be inserted in the licence, that the same shall serve for *any other parish within the diocese*, is not enjoined by any express law, but is very reasonable, being intended for the benefit of curates, that having been once examined and approved by the ordinary, they shall not need to be at the expence of a new licence for any other place unto which they shall remove within the diocese.—Which clause is omitted out of the present directions, supposing it perhaps to be unnecessary, in a matter the utility whereof is self-evident.

XII. This article concerning *the curates residence within the parish*, is agreeable to the antient laws of the church: and if the curate shall not comply with the ordinary's directions therein, the said ordinary may withdraw his licence.

To these directions, two others have been subjoined of late years:

ONE is, *That you be very cautious in accepting resignations; and endeavour, with the utmost care, by every legal method, to guard against corrupt and simoniacal presentations to benefices.*—This seemeth to be intended to counteract the purpose of bonds of resignations; for if the bishop will not accept, the resignation is ineffectual.

THE OTHER is, *That your clergy be required to wear their proper habits, preserving always an evident and decent distinction from the laity in their apparel; and to shew, in their whole behaviour, that seriousness gravity and prudence, which becomes their function; abstaining from all unsuitable company and diversions.*—The word *canonical*, with respect to the habit, seems here to have been purposely omitted; since no certain standard of dress can be conveniently limited by any canon or other law; and therefore general directions can only be applicable in such cases.

UPON the whole, with respect to the matter before us, whilst these directions continue to be the rule in practice, there are these five instruments to be transmitted to the bishop, at least twenty days before the time of ordination, by every person desiring to be ordained; viz.

First, A signification of his name and place of abode.

Secondly, A certificate of publication having been made in the church of his design to enter into holy orders.

Thirdly, Letters testimonial of his good life and behaviour.

Fourthly, Certificate of his age.

Fifthly, The title upon which he is to be ordained.

And moreover, if he comes for priest's orders, he must exhibit to the bishop his letters of orders for *deacon*.

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Form of a Title for orders.

There is no particular form of a title prescribed by any canon or other law: that which is most usual and approved seemeth to be as followeth.

To the right reverend father in god Richard lord bishop of London.

These are to certify your lordship, that I A. B. rector [or, vicar] of — in the county of —, and your lordship's diocese of London, do hereby nominate and appoint C. D. to perform the office of a curate in my church of — aforesaid, and do promise to allow him the yearly sum of — for his maintenance in the same, and to continue him to officiate in my said church until he shall be otherwise provided of some ecclesiastical preferment, unless by fault by him committed he shall be lawfully removed from the same. And I do solemnly declare, that I do not fraudulently give this certificate only to intitle the said C. D. to receive holy orders, but with a real intention to imploy him in my said church according to what is before expressed. Witness my hand this — day of — in the year of our lord —

Form of a testimonial for orders.

The canon and the statute before mentioned, evidently make a distinction between the testimonial for deacon's, and the testimonial for priest's orders. In pursuance whereof, for deacon's orders, no more by the canon seemeth to be required than this:

If it is from a college;

We the master and fellows of — college in — do hereby testify, that A. B. whose life and behaviour we have known for the space of three years now last past, is a person of good life and conversation. Given under the seal of our college, the — day of — in the year of our lord —

If it is not from a college;

We whose names and seals are hereunto set, do hereby testify, that A. B. whose life and behaviour we have known for the space of three years now last past, is a person of good life and conversation. Given under our hands and seals the — day of — in the year of our lord —

But something more is required in the testimonial for priest's orders by the aforesaid statute of the 13 El. c. 12. As thus:

We — do hereby testify, that A. B. whose life and behaviour we have known for the space of three years now last past, is a person of good and honest life and conversation, and professeth the doctrine expressed in the articles of religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy in the convocation holden at London in the year of our lord one thousand five hundred and sixty two. Given under &c.

But by the aforesaid directions of archbishop Wake, somewhat further is required in the testimonial both for deacon's and for priest's orders; namely,

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namely, (1) that the same do express for what particular end and design it is granted; and (2) that the persons signing the same do declare therein, that they have personally known the life and behaviour of the person for the time by them certified; and (3) that they do believe in their conscience, that he is qualified for that order, office, or employment, to which he desires to be admitted; and (4) that if the testimonial is from a college, it be *signed* as well as sealed by the particular members of the college therein specified.

It doth not appear to have been clearly understood, what the intention was in directing that the testimonial should express *for what particular end and design it is granted*: the causes usually alledged are, that it is a man's duty to bear witness to the truth; that the party hath requested such testimonial; and that they are willing to comply with such request: But these (such as they are) are *general* reasons, and do not at all express the special end and design of granting such a particular testimonial. However, the usual form of a testimonial, according to Mr. *Elton*, is to this effect:

To all christian people to whom these presents shall come.

Whereas piety and humanity do oblige us to bear witness to the truth; and whereas A. B. bachelor of arts, hath requested our letters testimonial of his laudable life and probity of manners to be granted to him: We being willing to comply with his so just a request, do testify by these presents, that the aforesaid A. B. having been personally known to us for the space of three years last past, hath led his life piously, soberly, and honestly; hath diligently applied himself to his studies; and hath not (so far as we know) ever held, written, or taught any thing, but what the church of England approves of and maintains; and moreover we think him worthy (if it shall so seem good to those whom it may concern) to be promoted to the holy order of deacon (or, priest). In witness whereof we have hereunto set our hands, the — day of — in the year of our lord —

Or thus (according to Dr. Grey):

To the right reverend father in god Richard lord bishop of Lincoln.

Whereas A. B. of — college in — desiring to be admitted to the holy order of deacon (or, priest), hath requested our letters testimonial of his laudable life and integrity of manners to be granted to him; We whose names are underwritten do testify by these presents, that the aforesaid A. B. for three years last past, of our personal knowledge, hath led his life piously soberly and honestly, hath diligently applied himself to the study of good learning, and hath not (so far as we know) held or published any thing but what the church of England approves of and maintains; and moreover we think him worthy to be admitted to the holy order of deacon (or, priest). In witness whereof we have hereunto subscribed our names, the — day of — in the year of our lord —

But in order to accommodate the same more strictly to the aforesaid canon, statute, and directions of archbishop *Wake*; perhaps the form might be more regularly thus:

To the right reverend father in god Charles lord bishop of Carlisle.

Whereas

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Whereas our beloved in Christ, A. B. bachelor of arts, hath declared unto us his intention of offering himself a candidate for the holy order of deacon; and for that end hath requested our letters testimonial of his good and honest life and conversation and other due qualifications, to be granted to him; We, whose names and seals are hereunto set, do testify by these presents, that we have personally known the life and behaviour of the aforesaid A. B. for the space of three years now last past; and that he hath, during the said time, been a person of good and honest life and conversation; and that he professeth the doctrine expressed in the articles of religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy in the convocation holden at London, in the year of our lord one thousand five hundred and sixty two: And we do believe in our consciences, that the said A. B. is qualified to be admitted (if it shall so please your lordship) to the holy order of deacon (or, priest). Given under our hands and seals the ——— day of ——— in the year of our lord ———

Hath declared unto us his intention of offering himself a candidate for the holy order of deacon] This, according to the archbishop's directions, seemeth to express the particular end and design for which the testimonial is granted.

That we have personally known the life and behaviour &c.] And not by way of recital, whose life and behaviour we have known, or having been personally known unto us, or the like; for the archbishop's directions in this case do require a positive declaration.

And that he hath during the said time been a person of good and honest life and conversation] This is required by the canon and the statute aforesaid: And herein the persons signing the testimonial do undertake for his behaviour.

And that he professeth the doctrine &c.] Herein they undertake for his orthodoxy: And this by the statute aforesaid is required to be peremptory and express; and not, so far as we know, or the like; for it is possible they may not have used the proper means of information.

And we do believe in our consciences &c.] In order to the forming of which belief, some sort of previous examination of the party, by the persons signing the testimonial, seemeth to be implied: And herein they undertake for his learning. Whereas, before; for deacon's orders, they did only take upon them, the knowledge of his behaviour; for priest's orders, of his behaviour and orthodoxy; but now, for both, by these directions, they are to take upon them the knowledge of his behaviour, orthodoxy, and learning: Altho' this last is most properly the bishop's province; and not at all the less so, notwithstanding such testimonial.

Organ. See Church.

Ornaments of the church. See Church.

Osculatory.

THE *osculatory*, was a tablet or board, with the picture of Christ, or the blessed virgin, or some other of the saints, which after the consecration of the elements in the eucharist, the priest first kissed himself, and then delivered it to the people for the same purpose.

Ostiary.

OSTIARY, is one of the five inferior orders in the Romish church; whose office it is, to keep the doors of the church, and to toll the bell. *Gibf.* 99.

Overseers of a will. See *Wills*.

Oxford. See *Colleges*.

Pall.

THE *pall*, pallium episcopale, is a hood of white lamb's wool, to be worn as doctors hoods upon the shoulders, with four crosses woven into it. And this pallium episcopale is the arms belonging to the see of Canterbury. *God.* 23. *1 Warn.* 45.

Pannage.

PANNAGE, *pasnage* (perhaps from *pasco*, to feed), is the fruit of trees which the swine or other cattle do feed upon in the woods; as acorns, crabs, mast of beech, chesnuts, and other nuts and fruits of trees in the woods: which is treated of under the title *Tithes*.

Sometimes also *pannage* is used to signify the money which is paid for the pannage it self.

Papist. See *Popery*.

Paraphernalia.

Paraphernalia.

PARAPHERNALIA, from *παρά* *præter*, and *δοῖν* *dos*, are the woman's apparel, jewels, and other things, which in the life time of her husband she wore as the ornaments of her person, to be allowed at the discretion of the court, according to the quality of her and her husband. *Law of Test.* 383.

Which is treated of under the title *Wills*.

Pardon.

1. **I**T seemeth to have been always agreed, that the king's pardon will discharge any suit in the spiritual court *ex officio*: also it seems to be settled at this day, that it will likewise discharge any suit in such court *ad instantiam partis pro reformatione morum* or *salute animæ*, as for defamation, or laying violent hands on a clerk, or such like; for such suits are in truth the suits of the king, tho' prosecuted by the party. *2 Haw.* 394.

2. Also, it seems to be agreed, that if the time to which such pardon hath relation, be prior to the award of costs to the party, it shall discharge them: And it seems to be the general tenor of the books, that tho' it be subsequent to the award of the costs, yet if it be prior to the taxation of them, it shall discharge them, because nothing appears in certain to be due for costs, before they are taxed. *id.*

3. Also, if a person be imprisoned on a writ *de excommunicato capi-endo*, for his contumacy in not paying costs, and afterwards the king pardons all contempts, it seems that he shall be discharged of such imprisonment, without any *scire faciās* against the party; because it is grounded on the contempt, which is wholly pardoned: and the party must begin anew to compel a payment of the costs. *2 Haw.* 394.

4. But it seems agreed, that a pardon shall not discharge a suit in the spiritual court, any more than in a temporal, for a matter of interest or property in the plaintiff; as for tithes, legacies, matrimonial contracts, and such like. Also it is agreed, that after costs are taxed in a suit in such court at the prosecution of the party, whether for a matter of private interest, or *pro reformatione morum* or *salute animæ*, as for defamation, or the like, they shall not be discharged by a subsequent pardon. *id.*

5. A person admitted to the benefit of clergy, is not to be deprived in the spiritual court, for the crime for which he hath had his clergy. For a pardon frees the party from all subsequent punishment, and consequently from deprivation. *2 Haw.* 364.

Pardon.

6. By the statute of the 20 G. 2. c. 52. (which is the last act of general pardon), all contempts in the ecclesiastical court in matters of correction are pardoned; but not in causes which have been commenced for matters of right.

Parish.

First institution
of parishes.

AT first there were no parochial divisions of cures here in England, as there are now. For the bishops and their clergy lived in common; and before that the number of christians was much increased, the bishops sent out their clergy to preach to the people, as they saw occasion. But after the inhabitants had generally embraced christianity, this itinerant and occasional going from place to place, was found very inconvenient, because of the constant offices that were to be administered, and the people not knowing to whom they should resort for spiritual offices and directions. Hereupon the bounds of parochial cures were found necessary to be settled here, by those bishops who were the great instruments of converting the nation from the saxon idolatry. At first they made use of any old british churches that were left standing; and afterwards from time to time in successive ages, churches were built and endowed by lords of manors and others, for the use of the inhabitants of their several manors or districts, and consequently parochial bounds affixed thereunto. 1 *Still.* 88, 89.

And it was this which gave a primary title to the patronage of laymen; and which also oftentimes made the bounds of a parish commensurate to the extent of a manor. *Ken. Impropr.* 5, 6, 7.

Many of our writers have ascribed the first institution of parishes in England to archbishop *Honorius*, about the year 636; wherein they build all on the authority of archbishop *Parker*. But Mr *Selden* seems rightly to understand the expression *provinciam suam in parochias divisit*, of dividing his province into new *dioceses*; and this sense is justified by the author of the defence of pluralities. The like distinction of parishes which now obtains, could never be the model of *Honorius*, nor the work of any one age. Some rural churches there were, and some limits prescribed for the rights and profits of them. But the reduction of the whole country into the same formal limitations was gradually advanced, being the work of many generations. However at the first foundation of parochial churches (owing sometimes to the sole piety of the bishop, but generally to the lord of the manor) they were but few, and consequently at a great distance: so as the number of parishes depending on that of churches, the parochial bounds were at first much larger, and by degrees contracted. For as the country grew more populous, and persons more devout, several other churches were founded within the extent of the former, and then a new parochial circuit was allotted in proportion to the new church, and the manor

manor or estate of the founder of it. Thus certainly began the increase of parishes, when one too large and diffuse for the resort of all inhabitants to the one church, was by the addition of some one or more new churches cantoned into more limited divisions. This was such an abatement to the revenue of the old churches, that complaint was made of it in the time of Edward the confessor: "Now (say they) there be three or four churches, " where in former times there was but one; and so the tithes and profits " of the priests are much diminished." *Ken. Par. Ant.* 586, 587.

And now, the settling the bounds of parishes depends upon ancient and immemorial custom. For they have not been limited by any act of parliament, nor set forth by special commissioners; but have been established, as the circumstances of times and places and persons did happen, to make them greater or lesser. *1 Still.* 243.

In some places parishes seem to interfere, when some place in the middle of another parish belongs to one that is distant; but that hath generally happened by an unity of possession, when the lord of a manor was at the charge to erect a new church, and make a distinct parish of his own demesns, some of which lay in the compass of another parish. *1 Still.* 244.

But now care is taken (or ought to be) by annual perambulations to preserve those bounds of parishes, which have been long settled by custom.

1 Still. 244.

2. By a constitution of archbishop *Winchelsey*; the parishioners shall find at their own charge *banners for the rogations*. *Lind.* 252.

And upon the account of perambulations being performed in rogation week, the rogation days were anciently called *gange-days*; from the saxon *gan*, or *gangan*, to go.

M. 37 & 38 *El. Goodday and Mickell*. Trespass for breaking his close, and for breaking down two gates, and three perches of hedge. The defendant justifies; for that the said close was in the parish of Rudham, and that all the parishioners there for time immemorial had used to go over the said close upon their perambulation in rogation week; and because the plaintiff stopped the two gates and obstructed three perches of hedge in the said way, the defendant being one of the parishioners broke them down. And by the court; It is not to be doubted, but that parishioners may well justify the going over any man's land in the perambulation, according to their usage, and abate all nufances in their way. *Gro. Eliz.* 441.

In the perambulation of a parish, no refreshment can be claimed by the parishioners, as due of right from any house or lands in virtue of custom. The making good such a right on that foot, hath been twice attempted in the spiritual courts; but in both cases, prohibitions were granted, and the custom declared to be against law and reason. *Gibf.* 213. *2 Roll's Rep.* 259. *2 Lev.* 163. *3 Keb.* 609.

These perambulations (tho' of great use in order to preserve the bounds of parishes) were in the times of popery accompanied with great abuses; viz. with feattings and with superstition; being performed in

Perambulation
of the boun-
daries of pa-
rishes.

the nature of processions, with banners, hand bells, lights, staving at crosses, and the like. And therefore when *processions* were forbidden, the useful and innocent part of *perambulations* was retained, in the injunctions of queen Elizabeth; wherein it was required, that for the retaining of the perambulation of the circuits of parishes, the people should once in the year, at the time accustomed, with the curate and the substantial men of the parish, walk about the parishes, as they were accustomed, and at their return to the church make their common prayers. And the curate, in their said common perambulations, was at certain convenient places to admonish the people, to give thanks to god (in the beholding of his benefits), and for the increase and abundance of his fruits upon the face of the earth; with the saying of the 103d psalm. At which time also the said minister was required, to inculcate these or such like sentences, *Cursed be he which translateth the bounds and dolles of his neighbour*; or such other order of prayers, as should be lawfully appointed. *Gibf. 213.*

But the superstitions here laboured against, were not so easily suppressed; as may be gathered from the endeavours used to suppress them so late as the time of archbishop Grindal: And now, since that hath been long effected, it were to be wished, that perambulations were held more regularly and frequently than now they are; to the end the limits of parishes may be the better kept up and ascertained. *Gibf. 213.*

Bounds of parishes where to be tried.

3. The bounds of parishes, tho' coming in question in a spiritual matter, shall be tried in the temporal court. This is a maxim, in which all the books of common law are unanimous; altho' our provincial constitutions do mention the bounds of parishes, amongst the matters which merely belong to the ecclesiastical court, and cannot belong to any other. *Gibf. 212.*

And in the 14 C. when a prohibition was prayed to the spiritual court, for proceeding to determine a case of tithes, the right to which depended on the lands lying in this or that *vill*; it was denied by the whole court of king's bench, who declared, that the bounds of vills are triable in the ecclesiastical court. *Gibf. 213.*—But this was between two spiritual persons, the rector and vicar. *2 Roll's Abr. 312.*

And in the case of *Ives and Wright, H. 15 Car.* If the bounds of a village in a parish come in question in the ecclesiastical court, in a suit between the parson impropriate and the vicar of the same parish, as if the vicar claim all the tithes within the village of D. within the parish, and the parson all the tithes in the residue of the parish, and the question between them is, whether certain lands, whereof the vicar claims the tithe, be within the village of D. or not; yet inasmuch as it is between spiritual persons, viz. between the parson and vicar, altho' the parson be a layman, and the parsonage appropriate a lay-fee, yet it shall be tried in the ecclesiastical court. And in this case the prohibition was denied. *2 Roll's Abr. 312.*

And by the 17 G. 2. c. 37. it is enacted, that where there shall be any dispute, in what parish or place, improved wastes and drained and improved

proved marsh lands lie, and ought to be rated; the occupiers of such lands, or houses built thereon, tithes arising therefrom, mines therein, and saleable underwoods, shall be rated to the relief of the poor and to all other parish rates, within such parish and place which lies nearest to such lands: and if on application to the officers of such parish or place to have the same assessed, any dispute shall arise; the justices of the peace at the next sessions after such application made, and after notice given to the officers of the several parishes and places adjoining to such lands, and to all others interested therein, may hear and determine the same on the appeal of any person interested, and may cause the same to be equally assessed; whose determination therein shall be final. But this shall not determine the boundaries of any parish or place, other than for the purpose of rating such lands to the relief of the poor, and other parochial rates. *f. 1, 2.*

Parish clerk.

1. **BONIFACE.** *We do decree, that the offices for holy water be conferred upon poor clerks.* Lind. 142. Parish clerk.

For the understanding of which constitution, it is to be observed, that parish clerks were heretofore real clerks; of whom every minister had at least one, to assist under him, in the celebration of divine offices; and for his better maintenance, the profits of the office of *aquabajulus* (who was an assistant to the minister in carrying the holy water) were annexed unto the office of the parish clerk by this constitution: so as, in after times, *aquabajulus* was only another name for the clerk officiating under the chief minister.

2. *Can. 91.* And the said clerk shall be twenty years of age at the least; known to the parson, vicar, or minister, to be of honest conversation, and sufficient for his reading, writing, and also for his competent skill in singing (if it may be). His qualification.

3. All incumbents once had the right of nomination of the parish clerks, by the common law and custom of the realm. *Gibf. 214.* How to be appointed.

And by the aforesaid constitution of archbishop Boniface;—Because differences do sometimes arise between rectors and vicars and their parishioners, about the conferring of such offices; we do decree, that the same rectors and vicars, whom it more particularly concerneth to know who are fit for such offices, shall endeavour to place such clerks in the aforesaid offices, who according to their judgment are skilled and able to serve them agreeably in the divine administration, and who will be obedient to their commands.

And by *Can. 91.* No parish-clerk upon any vacation shall be chosen within the city of London or elsewhere, but by the parson or vicar; or where there is no parson or vicar, by the minister of that place for the time being: which choice

Parish clerk.

choice shall be signified by the said minister vicar or parson, to the parishioners the next Sunday following in the time of divine service.

Since the making of which canon, the right of putting in the parish clerk hath often been contested between incumbents and parishioners, and prohibitions prayed, and always obtained, to the spiritual court for maintaining the authority of the canon in favour of the incumbent, against the plea of custom in behalf of the parishioners. *Gibf. 214.*

Thus, *E. 8 Ja. Cundie* and *Plomer*. The Parishioners of the parish of St. Alphage in Canterbury, did prescribe to have the election of their parish clerk, and by the canon the election of the clerk is given to the vicar: It was adjudged in this case, that the prescription should be preferred before the canon; and a prohibition was awarded accordingly. *Hughes 275.*

T. 21 Ja. Jermyn's case. Jermyn, rector of the parish of St. Katherine's in Coleman street, and Hammond as clerk there, sued in the spiritual court to have the said clerk established there, being placed there by the parson according to the late canon; where the parishioners disturbed him upon pretence of a custom to place the clerk there by the election of their vestry. And upon this surmise of a custom, the churchwardens and parishioners prayed a prohibition; and after divers motions, a prohibition was granted: for they held that it was a good custom, and that the canon cannot take it away. *Cro. Ja. 670.*

How to be admitted.

4. Parish clerks after having been duly chosen and appointed, are usually licensed by the ordinary. *Johnsf. 204.*

And when they are licensed, they are sworn to obey the minister. *Johnsf. 205.*

And if a parish clerk hath been used time out of mind to be chosen by the vestry, and after admitted and sworn before the archdeacon, and he refuse to swear such parish clerk so elected, but admitteth another chosen by the parson; a writ may be awarded to him commanding him to swear him. 2 *Roll's Abr. 234.* *Viner. Mandamus H. 3.* 3 *Bac. Abr. 531.*

And in the case of *K. and Henchman*, official of the consistory court of the bishop of London, a mandamus was granted, to admit one Robert Trott to the office of parish clerk of Clerkenwell, being elected by the parish; it being shewn that the official had usually admitted to that office. 3 *Bac. Abr. 531.*

His salary.

5. By the aforesaid constitution of archbishop Boniface; *If the parishioners shall maliciously withhold the accustomed alms from the aquæbajalus, they shall be earnestly admonished to render the same; and if need be, shall be compelled by ecclesiastical censure.*

Alms] By which word we may understand, that such clerks cannot claim any thing by way of a certain allowance or endowment by reason of their office of *aquæbajalus*: But their sustentation ought to be collected and levied according to the manner and custom of the country. *Lindw. 143.*

Accustomed

Parish clerk.

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Accustomed alms] For this custom ought to be considered according to the manner anciently observed; which also, inasmuch as it concerneth the increase of divine worship, ought not to be changed at pleasure: but hereunto the parishioners may be compelled by the bishop. *Lindw. 143.*

And custom of this kind is good and laudable, that every master of a family (for instance) on every lord's day give to the clerk bearing the holy water somewhat according to the exigency of his condition; and that on christmas day he have of every house one loaf of bread, and a certain number of eggs at easter, and in the autumn certain sheaves. Also that may be called a laudable custom, where such clerk every quarter of the year receiveth something in certain in money for his sustenance, which ought to be collected and levied in the whole parish. For such laudable custom is to be observed; and to this the parishioners ought to be compelled: for having paid the same for so long a time, it shall be presumed that at first they voluntarily bound themselves thereunto. *Lindw. 143.*

Admonished] Not only by the ministers, but also and more especially by the ordinary of the place. *Lindw. 143.*

By ecclesiastical censure] Of which there are three kinds; suspension, excommunication, and interdict. *Lindw. 143.*

And by Can. 91. *The said clerks shall have and receive their ancient wages, without fraud or diminution, either at the hands of the churchwardens, at such times as hath been accustomed, or by their own collection, according to the most ancient custom of every parish.*

Ancient wages] In case such customary allowance is denied, the foregoing constitution, and the practice thereupon, direct where it is to be sued for, viz. before the ordinary in his ecclesiastical court. That constitution (as we see) calls those wages *accustomed alms*; and in the register there is a consultation provided in a case of the same nature, for what the writ calls *largitio charitativa* (as being originally a free gift), which by parity of reason may be fairly extended to the present case. *Gibf. 214.*

But by the common law; If a parish clerk claim by custom to have a certain quantity of bread at christmas, of every inhabitant of the parish, or the like, and sue for this in the spiritual court; a prohibition lieth. *2 Roll's Abr. 286.*

H. 12 G. 2. Pitts and Evans. A prohibition was granted to a suit in the spiritual court by the clerk of St. Magnus for 1s 4d assessed on the defendant's house at a vestry in 1672, to be paid to the parish clerk. For by the court, he is a temporal officer; or if not, yet he could not sue there for such a rate: for if it is due by custom, he may maintain an *assumpsit*; if not, a *quantum meruit*, or a bill in equity. *Str. 1108.*

M. 3 An. Parker and Clerke. The clerk of a parish libelled against the churchwardens, for so much money due to him by custom every year, and to be levied by them on the respective inhabitants in the said pa-

Parish clerk.

rish; and after sentence in the spiritual court, the defendants suggested for a prohibition, that there was no such custom as the plaintiff had set forth in his libel. It was objected against granting the prohibition, that it was now too late, because it was after sentence, especially since the custom was not denied; for if it had, and that court had proceeded, then, and not before, it had been proper to move for a prohibition. But by Holt chief justice; it is never too late to move the king's bench for a prohibition, where the spiritual court had no original jurisdiction, as they had not in this case, because a clerk of a parish is neither a spiritual person, nor is this duty in demand spiritual, for it is founded on a custom, and by consequence triable at law; and therefore the clerk may have an action on the case against the churchwardens for neglecting to make a rate, and to levy it, or if it had been levied and not paid by them to the plaintiff. *6 Mod. 252. 3 Salk. 87.*

How to be removed from his office.

6. The parish clerk ought to be deprived by him that placed him in his office; and if he is unjustly deprived, a mandamus will lie to the churchwardens to restore him: for the law looks upon him as an officer for life, and one that hath a freehold in his place, and not as a servant; and therefore will not suffer the ecclesiastical court to deprive him, but only to correct him for any misdemeanor by ecclesiastical censures. *2 Roll's Abr. 234. Gibf. 214. God. 192.*

T. 13 G. Townshend and Thorpe. The plaintiff declared in prohibition, that he was indicted for an assault with intent to commit sodomy, notwithstanding which he was proceeded against in the spiritual court for the same offence, and for drunkenness. The defendant pleaded, that the plaintiff was a parish clerk, and that the suit there was not only to punish him for the incontinency, but also to deprive him of his office. Demurrer thereupon. And as it was going to be argued, the court proposed to stay till the indictment was tried; and it having been tried, and the defendant convicted and pilloried, the court, without ordering the declaration to be amended, granted a consultation as to the proceeding to deprive, and confirmed the prohibition as to any other punishment. They said, he was an ecclesiastical officer as to every thing but his election. *Str. 776.*

M. 6 G. 2. Peak and Bourne. The plaintiff declared in prohibition, that he was sued in the spiritual court for executing the office of deputy parish clerk, without the licence of the ordinary. On demurrer, three points were made: 1. Whether a parish clerk be a temporal or a spiritual officer. 2. Whether he can make a deputy. 3. Whether the licence of the ordinary is requisite. It was argued three several times upon all the points. But the court in giving judgment founded themselves only upon the last; as to which they held, that a licence was not necessary, and therefore gave judgment for the plaintiff in prohibition. They said the canon did not require it, and indeed it would be a transferring the right of appointment to all intents and purposes to the ordinary. As to the two other points, the court strongly inclined that he was a temporal officer as to the right of his office; and that he might make a deputy. And

Parish clerk.

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And as to the first, when the court were pressed with their own authority in *Townshend* and *Thorp*, they said it was a hasty opinion, into which they were transported by the enormity of the case. *Str.* 942.

Parochial library. See *Library*.

Parson.

PARSON, *persona*, properly signifies the rector of a parish church; because during the time of his incumbency he represents the church, and in the eye of the law sustains the *person* thereof, as well in suing, as in being sued, in any action touching the same. *God.* 185.

Parson *imparsonce* (*persona impersonata*) is he that as lawful incumbent is in actual possession of a parish church, and with whom the church is full, whether it be presentative or impropriate. *1 Inst.* 300.

The law concerning parsons, as distinct from vicars, is treated of under the title *Appropriation*.

Patriarch.

A *Patriarch* is the chief bishop over several *countries* or provinces, as an archbishop is of several dioceses; and hath several archbishops under him. *God.* 20.

Patron, patronage. See *Advowson*.

Peculiar.

1. **E**XEMPT jurisdictions are so called, not because they are under no ordinary; but because they are not under the ordinary of the diocese, but have one of their own. These are therefore called peculiar, and are of several sorts. *1 Still.* 336.

2. As, first, Royal peculiar; which are the king's free chapels, and are exempt from any jurisdiction but the king's, and therefore such may be resigned into the king's hands as their proper ordinary; either by ancient privilege, or inherent right. *1 Still.* 337. *Lindw.* 125.

T 2

3. Peculiar

Archbishops
peculiars.

3. Peculiars of the archbishops, exclusive of the bishops and archdeacons; which sprung from a privilege they had, to enjoy jurisdiction in such places where their seats and possessions were: and this was a privilege no way unfit or unreasonable, where their palaces were, and they oftentimes repaired to them in person; as anciently the archbishops appear to have done, by the multitude of letters dated from their several seats. *Gibf. 978.*

In these peculiars (which, within the province of Canterbury, amount to more than a hundred, in the several dioceses of London, Winchester, Rochester, Lincoln, Norwich, Oxford, and Chichester) jurisdiction is administered by several commissaries; the chief of whom is the dean of the arches, for the thirteen peculiars within the city of London. And of these, Lindwood observes, that their jurisdiction is archidiaconal. *Gibf. 978.*

Peculiars of
bishops in
another dio-
cese.

4. Peculiars of bishops, exclusive of the jurisdiction of the bishop of the diocese in which they are situated. Of which sort, the bishop of London hath four parishes within the diocese of Lincoln; and every bishop, who hath a house in the diocese of another bishop, may therein exercise episcopal jurisdiction. And therefore Lindwood says, the signification of *bishoprick* is larger than that of *diocese*, because a bishoprick may extend into the diocese of another bishop, by reason of a peculiar jurisdiction which the bishop of another diocese may have therein. *Gibf. 978.*

Peculiars of
bishops in
their own
diocese, ex-
clusive of
archidiaconal
jurisdiction.

5. Peculiars of bishops in their own diocese, exclusive of archidiaconal jurisdiction. Of which, Lindwood writes thus: There are some churches, which altho' they be situate within the precincts of an archdeaconry, yet are not subject to the archdeacon; such as churches regular of monks, canons, and other religious; so also if the archbishop hath reserved specially any churches to his own jurisdiction, so as that within the same the archdeacon shall exercise no jurisdiction; as it is in many places, where the archbishops and bishops do exercise an immediate and peculiar jurisdiction. *Gibf. 978.*

As to the former of these, the jurisdiction over religious houses; the archdeacons were excluded from that by the ancient canon law, which determines, that archdeacons shall have no jurisdiction in monasteries, but only by general or special custom; and if the archdeacon could not make out such custom, he was to be excluded from jurisdiction, because he could not claim any authority of common right. As to the other, namely, the exempting of particular parishes from archidiaconal jurisdiction; there are not only many instances of such exemptions in the ecclesiastical records, but the parishes themselves continue so exempt, and remain under the immediate jurisdiction of the archbishop, as in other places of the bishop. *Gibf. 978.*

Of deans,
prebendaries,
and others.

6. Peculiars of deans, deans and chapters, prebendaries, and the like; which are places wherein by ancient compositions the bishops have parted with their jurisdiction as ordinaries, to those societies; probably because the possessions of the respective corporations, whether sole or aggregate, lay chiefly in those places: the right of which societies was not original, but

but derived from the bishop; and where the compositions are lost, it depends upon prescription. *Gibf.* 978. 1 *Still.* 337.

M. 8 W. Robinson and Godsalve. Upon motion for a prohibition to stay a suit in the bishop's court, upon suggestion that the party lived within a peculiar archdeaconry; it was resolved by the court, that where the archdeacon hath a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there and hold court; and in such case, if the party who lives within the peculiar be sued in the bishop's court, a prohibition shall be granted: but if the archdeacon hath not a peculiar, then the bishop and he have concurrent jurisdiction, and the party may commence his suit, either in the archdeacon's court or the bishop's, and he hath election to chuse which he pleaseth: and if he commence in the bishop's court, no prohibition shall be granted; for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there. *L. Raym.* 123.

It seems to be true doctrine, that no exemptions granted to persons or bodies under the degree of bishop, extend to a power of employing any bishop they can procure, to perform for them such acts as are merely episcopal, unless special words be found in their grants of exemption, empowering and warranting them so to do; but that all such acts are to be performed by the bishop of the diocese within which they are situated, after the exemption as much as before: Or, in other words, that the exemptions in which no such clause is found, are only exemptions from the exercise of such powers, as the persons or bodies are *capable* of exercising. Thus it is in granting letters dimissory (as hath been shewed before, in the title *Ordination*.) And thus it seems to have been understood, in the act of consecrating churches and churchyards, and reconciling them when polluted; by a licence which we find the dean of Windsor had from the guardian of the spiritualties of Salisbury, to employ any catholick bishop to reconcile the cloyster and yard of the said free chapel, when they had been polluted by the shedding of blood. *Gibf.* 978.

In the time of archbishop Winchelsey, upon an appeal to Rome, in a controversy concerning Pagham, a peculiar of the archbishop of Canterbury; it was said, in the representation to the pope, to be of Canterbury diocese; which was objected against in the exceptions on the other side, because in truth and notoriety it is in the diocese of Chichester. Which was a just exception in point of form; because the proper style of those peculiars, as often as they are mentioned in any instruments, is, *of or in such a diocese* (namely, the diocese in which they are situated) *and of the peculiar and immediate jurisdiction of the archbishop.* *Gibf.* 979.

7. *Peculiars belonging to monasteries; concerning which, it is enacted Of monasteries.* by the 31 *H. 8. c. 13.* that such of the late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, and all churches and chapels to them belonging, which before the dissolution were exempted from the visitation and other jurisdiction of the ordinary, shall from henceforth be within

Deculiar.

within the jurisdiction and visitation of the ordinary, within whose diocese they are situate, or within the jurisdiction and visitation of such persons the king shall be limited and appointed. *f. 23.*

Such exemptions were commonly granted at Rome, to those who solicited for them; especially to the larger monasteries, and such who had wealth enough to solicit powerfully: but the right of visitation being of common right in the bishop, the religious who had obtained such exemptions, were liable to be cited, and were bound upon pain of contumacy, either to submit to his visitation, or to exhibit their bulls of exemption, to the end they might be viewed and examined, and the bishop might see of what authority and extent they were. And whereas this statute vests a power in the king, to subject any of those religious houses which were heretofore made exempt, to such jurisdiction as he should appoint, exclusive of the ordinary; there can be no doubt, but that the persons who claim exemption from the visitation of the ordinary in virtue of such appointment, are obliged upon pain of ecclesiastical censures (in like manner as the religious were) to submit the evidences of their exemption to the examination of the ordinary; without which, it is impossible for him to know how far his authority extends. *Gibf. 977.*

Appeal from
places exempt.

8. By the 25 *H. 8. c. 19.* All appeals to be had from places exempt, which heretofore, by reason of grants or liberties of such places exempt, were to the bishop or see of Rome, shall be to the king in chancery; which shall be definitively determined by authority of the king's commission: so that no archbishop or bishop shall intermit or meddle with any such appeals, otherwise than they might have done before the making of this act. *f. 6.*

Visitation of
places exempt.

9. By the 25 *H. 8. c. 21.* Visitations of places exempt, which heretofore were visited by the pope, shall not be by the archbishop of Canterbury; but in such cases, redress visitation and confirmation shall be by the king, by commission under the great seal.

And by the statute of the 1 *G. 2. c. 10.* All donatives which have received or shall receive the augmentation of the governors of queen Anne's bounty, shall thereby and from thenceforth become subject to the jurisdiction of the bishop of the diocese: and that no prejudice may thereby arise to the patrons of such donatives, it is provided, that no such donative shall be so augmented, without consent of the patron under his hand and seal.

Penance.

Of penance
and commuta-
tion in gene-
ral.

1. **P**ENANCE is an ecclesiastical punishment, used in the discipline of the church, which doth affect the body of the penitent; by which he is obliged to give a publick satisfaction to the church, for the scandal he hath given by his evil example. So in the primitive times,

times, they were to give testimonies of their reformation, before they were re-admitted to partake of the mysteries of the church. In the case of incest, or incontineney, the sinner is usually enjoined to do a publick penance in the cathedral, or parish church, or publick market, bare-legged and bareheaded in a white sheet, and to make an open confession of his crime in a prescribed form of words; which is augmented or moderated according to the quality of the fault, and the discretion of the judge. So in smaller faults and scandals, a publick Satisfaction or penance, as the judge shall decree, is to be made before the minister, churchwardens, or some of the parishioners, respect being had to the quality of the offence, and circumstances of the fact; as in the case of defamation, or laying violent hands on a minister, or the like. *God. Append. 18.*

And as these censures may be moderated by the judge's discretion, according to the nature of the offence; so also they may be totally altered by a commutation of penance: and this hath been the ancient privilege of the ecclesiastical judge, to admit that an oblation of a sum of money for pious uses shall be accepted in satisfaction of publick penance. *id. 19.*

But penance must be first enjoined, before there can be a commutation; otherwise it is a commutation for nothing. *God. 89.*

2. Lindwood and other canonists mention three sorts of penance:

Penance of divers kinds.

(1) Private; enjoined by any priest in hearing confessions.

(2) Publick; enjoined by the priest for any notorious crime, either with or without the bishop's licence according to the custom of the country.

(3) Solemn penance; concerning which it is ordained by a constitution of archbishop *Peccham*, as followeth: Whereas according to the sacred canons, greater sins, such as incest and the like, which by their scandal raise a clamour in a whole city, are to be chastised with solemn penance; yet such penance seemeth to be buried in oblivion by the negligence of some, and the boldness of such criminals thereby is increased; we do ordain, that such solemn penance be for the future imposed, according to the canonical sanctions. *Lindw. 339.*

And this penance could be enjoined by the bishop only; and did continue for two, three, or more years. But in latter ages, for how many years soever this penance was inflicted, it was performed in Lent only. At the beginning of every Lent, during these years, the offender was formally turned out of the church; the first year, by the bishop; the following year by the bishop; or priest. On every Maundy Thursday, the offender was reconciled and absolved, and received the sacrament on Easter-day, and on any other day till Low-Sunday: This was done either by the bishop or priest. But the last final reconciliation, or absolution could be passed regularly by none but the bishop. And it is observable, that even down to Lindwood's time, there was a notion prevailed, that this solemn penance could be done but once: If any man relapsed after such penance, he was to be thrust into a monastery, or was not owned by the church; or however ought not to be owned according to

to the strictness of the canon; tho' there is reason to apprehend, that it was often otherwise in fact. And indeed this solemn penance was so rare in those days, that all which hath been said on this subject was rather theory than practice, except perhaps in case of heresy. *Johns. Pecch.*

By canon.

3. *Boniface.* We do ordain, that laymen shall be compelled by the sentence of excommunication, to submit to canonical penances, as well corporal as pecuniary, inflicted on them by their prelates. And they who hinder the same from being performed, shall be coerced by the sentences of interdict and excommunication. And if distresses shall be made on the prelates upon this account, the distrainers shall be proceeded against by the like penalties. *Lind. 321.*

Which corporal penances Lindwood specifieth in divers instances; as, thrusting them into a monastery, branding, fustigation, imprisonment. *Lind. 321.*

Othob. We do decree, that the archdeacons for any mortal and notorious crime, or from whence scandal may arise, shall not take money for the same of the offenders, but shall inflict upon them condign punishment. *Alton. 125.*

Stratford. Because the offender hath no dread of his fault, when money buys off the punishment; and the archdeacons, and their officials, and some that are their superiors, when their subjects of the clergy or laity commit relapses into adultery, fornication, or other notorious excesses, do for the sake of money remit that corporal penance, which should be inflicted for a terror to others; and they who receive the money apply it to the use of themselves, and not of the poor, or to pious uses, which is the occasion of grievous scandal, and ill example: Therefore we do ordain, that no money be in any wise received for notorious sin, in case the offender hath relapsed more than twice; on pain of restoring double of what shall have been so received within one month after the receipt thereof, to be applied to the fabrick of the cathedral church, and of suspension ab officio, which they who receive the same, and do not restore double thereof within one month as aforesaid, shall ipso facto incur. And in commutations of corporal penances for money (which we forbid to be made without great and urgent cause), the ordinaries of the places shall use so much moderation, as not to lay such grievous and excessive publick corporal penances on offenders, as indirectly to force them to redeem the same with a large sum of money. But such commutations, when they shall hereafter be thought fit to be made, shall be so modest, that the receiver be not thought rapacious, nor the payer too much aggrieved; under the penalties before mentioned. *Lind. 323.*

By statute.

4. By the statute of Circumspecte agatis, 13 *Ed. 1. §. 4.* The king to his judges sendeth greeting: Use your selves circumspectly concerning the bishops and their clergy, not punishing them if they hold plea in court christian of such things as be mere spiritual, that is to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like; for the which, sometimes corporal penance, and sometimes pecuniary is enjoined:

injoined: in which cases the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.

By the statute of Articuli cleri, 9 *Ed. 2. ff. 1. c. 2.* If a prelate injoin a penance pecuniary to a man for his offence, and it be demanded; the king's prohibition shall hold place: But if prelates injoin a penance corporal, and they which be so punished will redeem upon their own accord such penances by money; if money be demanded before a spiritual judge, the king's prohibition shall hold no place.

And by the same statute, *c. 3.* If any lay violent hands on a clerk, the amends for the peace broken shall be before the king, and for the excommunication before a prelate, that corporal penance may be enjoined; which if the offender will redeem of his own good will, by giving money to the prelate, or to the party grieved, it shall be required before the prelate, and the king's prohibition shall not lie.

Before the prelate] It seems to be agreed by the canonists, that *archdeacons* may not inflict pecuniary penalties, unless warranted by prescription. *Gibf. 1046.*

5. Dr Ayliffe says, that anciently the commutation money was to be applied to the use of the church, as fines in cases of civil punishment are converted to the use of the publick. *Ayl. Par. 413.*

Disposal of
the commuta-
tion money.

By several of the canons made in the time of queen *Elizabeth*, and in the year 1640, it was to be applied to pious and charitable uses; and the *Reformatio legum* directed, that it should be to the use of the poor of the parish where the offence was committed, or the offender dwelled. And there was to be no commutation at all, but for very weighty reasons, and in cases very particular. And when commutation was made, it was to be with the privity and advice of the bishop. In archbishop Whitgift's register we find that the commutation of penance, without the bishop's privity, was complained of in parliament. And it was one of king William's injunctions, that commutation be not made, but by the express order and direction of the bishop himself declared in open court. And by the canons of 1640, if in any case the chancellor, commissary, or official should commute penance without the privity of the bishop; he was at least to give a just account yearly to the bishop, of all commutation money in that year, on pain of one year's suspension. *Gibf. 1045.*

In the reign of queen Anne, this matter was taken into consideration by the convocation, who made the following regulations; viz. — That no commutation of penance be hereafter accepted or allowed of, by any ecclesiastical judge, without an express consent given in writing by the bishop of the diocese, or other ordinary having exempt jurisdiction; or by some person or persons to be especially deputed by them for that purpose: and that all commutations, or pretended commutations, accepted or allowed otherwise than is hereby directed, be ipso facto null and void. — And that no sum of money, given or received for any commutation of penance, or any part thereof, shall be disposed of to any use,

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use, without the like consent and direction in writing, of the bishop, or other ordinary having exempt jurisdiction, if the cause hath been prosecuted in their courts; or of the archdeacon, if the cause hath been prosecuted in his court. And all money received for commutation, pursuant to the foregoing directions, shall be disposed of to pious and charitable uses, by the respective ordinaries above named: Whereof at the least one third part shall by them be disposed of in the parish where the offenders dwell. And that a register be kept in every ecclesiastical court, of all such commutations, and of the particular uses to which such money hath been applied. And that the account so registred, be every year laid before the bishop, or other ordinary exempt having episcopal jurisdiction, in order to be audited by them. And that any ecclesiastical judge or officer offending in any of the premisses, be suspended for three months for the said offence. *Gibf. 1046.*

But as none of these regulations are now in force, nor of the said canons made in the time of queen Elizabeth and in the year 1640; Mr *Oughton* says, generally, that commutation money is to be given to the poor where the offence was committed, or applied to other pious uses *at the discretion of the judge.* 1 Ought. 213.

About the year 1735, the bishop of Chester cited his commissary to the archbishop's court at York, to exhibit an account of the money received for commutations, and to shew cause why an inhibition should not go against him, that for the future he should not presume to dispose of any sum or sums received on that account, without the consent of the bishop. In obedience to this, an account was exhibited without oath; and that being objected to, a fuller was exhibited upon oath. And upon the hearing, several of the sums in the last account were objected to as not allowable, and an inhibition prayed to the effect above. But the archbishop's chancellor refused to grant such inhibition; and was of opinion, that the bishop could only oblige an account: and so dismissed the commissary without costs.

Pension.

PENSIONS are certain sums of money paid to clergymen in lieu of tithes. And some churches have settled on them annuities or pensions payable by other churches.

Thus in the *Registrum Honoris de Richmond*, we find a pension paid out of *Coram* or *Coverham* abbey in the county of *York* (unto which the church of *Sedbergh* was appropriated), to the prior of *Connyfyde* (unto whose priory the church of *Orton* was appropriated) for the said church of *Sedbergh*, 20s. *Append. 94.*

These pensions are due by virtue of some decree made by an ecclesiastical judge upon a controversy for tithes, by which the tithes have been decreed to be enjoyed by one, and a pension instead thereof to be paid to another;

another; or they have arisen by virtue of a deed made by the consent of the parson, patron, and ordinary. *F. N. B.* 117.

At the dissolution of monasteries there were many pensions issuing out of their lands, and payable to several ecclesiastical persons; which lands were vested in the crown by the statutes of dissolution; in which statutes there is a saving to such persons of the right which they had to those pensions: but notwithstanding such general saving, those who had that right were disturbed in the collecting and receiving such pensions; and therefore by another statute, to wit, the 34 & 35 H. 8. c. 19. it was enacted, that *pensions, portions, corrodiess, indemnities, synodics, proxies, and all other profits due out of the lands of religious houses dissolved, shall continue to be paid to ecclesiastical persons by the occupiers of the said lands. And the plaintiff may recover the thing in demand, and the value thereof in damages in the ecclesiastical court, together with costs. And the like he shall recover at the common law, when the cause is there determinable.*

By the statute of Circumspecte agatis, 13 Ed. 1. ft. 4. *If a prelate of a church, or a patron, demand of a parson a pension due to him; all such demands shall be made in the spiritual court: in which case, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.*

In pursuance of which, the general doctrine is, that pensions, as such, are of a spiritual nature, and to be sued for in the spiritual court; and accordingly when they have come in question, prohibitions have been frequently denied, or consultations granted; even tho' they have been claimed upon the foot of prescription. *Gibbs.* 706.

But lord Coke says, if a pension be claimed by prescription, there, seeing a writ of annuity doth lie, and that prescriptions must be tried by the common law, because common and canon law therein do differ, they cannot sue for such a pension in the ecclesiastical court. *2 Inst.* 491.

But this hath sometimes been denied to be law: And in the case of *Jones and Stone, T. 12 W.* Holt chief justice said, he could never get a prohibition to stay a suit in the spiritual court against a parson for a pension by prescription. *Watsf. c. 56. 2 Salk. 550.*

In the case of *Dr Gooche and the bishop of London, M. 4 G. 2.* The bishop libelled in the spiritual court, suggesting that *Dr Gooche*, as archdeacon of Essex, is to pay 10l due to the bishop as a *prestation*, for the exercise of his exterior jurisdiction. The Dr moved for a prohibition, alledging that he had pleaded there was no prescription; and then that being denied, a prohibition ought to go for defect of trial. On the contrary, it was argued for the bishop, that the libel being general, it must not be taken that he goes upon a prescription; but it is to be considered in the same light as the common case of a pension, which is suable for in the spiritual court; and the nature of the demand shews it must have its original from a composition, it being a recompence for the archdeacon's being allowed to exercise a jurisdiction, which originally did belong to the ordinary. And by the court: The bishop may certainly intitle himself *ab antiquo*, without laying a prescription; and as it is only laid in general, there is no ground for us to interpose, till it

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appears by the proceedings that a prescriptive right will come in question; if they join issue on the plea, it will then be proper to apply; but at present there ought to be no prohibition. *Str.* 879.

M. 1724. *Bailey and Cornes.* In the exchequer: A bill was preferred for a pension only, payable to the preacher of Bridgnorth; and upon hearing of the cause (which was afterwards ended by compromise) it seemed to be admitted, that a bill might be brought for a pension only. *Burb.* 183.

A bishop may sue for a pension before a chancellor, and an archdeacon before his official. *Wood b.* 2. c. 2.

If a suit be brought for a pension, or other thing due of a parsonage, it seems that the occupier (tho' a tenant) ought to be sued; and if part of the rectory be in the hand of the owner, and part in the occupation of a tenant, the suit is to be against them both. *Watf.* c. 53.

And tho' there is neither house, nor glebe, nor tithes, nor other profits but only of easter-offerings burials and christnings; yet the incumbent is liable to pay the pension. *Harar.* 230.

If an incumbent leave arrearages of a pension, the successor shall be answerable; because the church it self is charged, into whatsoever hand it comes. *Cro. Eliz.* 810.

Pentecostals.

PENTECOSTALS, otherwise called *Whitsun-farthings*, took their name from the usual time of payment, at the feast of pentecost. These are spoken of in a remarkable grant of king Henry the eighth to the dean and chapter of Worcester; in which he makes over to them all those oblations and obventions, or spiritual profits, commonly called whitsun-farthings, yearly collected or received of divers towns within the archdeaconry of Worcester, and offered at the time of pentecost. From hence it appears that pentecostals were oblations; and as the inhabitants of chapelries were bound, on some certain festival or festivals, to repair to the mother church, and make their oblation there, in token of subjection and dependance; so, as it seems, were the inhabitants of the diocese obliged to repair to the cathedral (as the mother church of the whole diocese) at the feast of pentecost. Something like this was the coming of many priests and their people in procession to the church of St Austin in Canterbury, in whitsun-week, with oblations and other devotions; and in the register of Robert Read, who was made bishop of Chichester in the year 1396, there is a letter to compel the inhabitants of the parishes within the archdeaconry of Chichester, to visit their mother church in whitsun-week. *Gibf.* 976. 1 *Warn.* 339.

These oblations grew by degrees into fixed and certain payments, from every parish and every house in it; as appears not only from the forementioned grant of king Henry the eighth, but also from a remarkable passage in the articles of the clergy in convocation in the year 1399; where the sixth article is, a humble request to the archbishops and bishops, that it may be declared, whether peter-pence, the holy loaf, and pentecostals were to be paid by the occupiers of the lands, tho' the tenements were fallen or not inhabited, according to the ancient custom, when every parish paid a certain quota. *Gibf.* 976.

These are still paid in some few dioceses; being now only a charge upon particular churches, where by custom they have been paid. *Ken. Par. Ant.* 596. *Deg. p. 2. c. 15.*

And if they be denied, where they are due, they are recoverable in the spiritual court. *Gibf.* 977.

Perambulation. See Parish.

Perinde valere.

PERINDE *valere* was a writ of dispensation granted by the pope to a clerk admitted to a benefice, altho' incapable; taking that name from the words of the dispensation, which made it *perinde valere*, that is, to be as effectual to the party, as if he were capable. *Gibf.* 87.

Perjury.

IF perjury be committed in a temporal cause, it is punishable only in the temporal courts; but where it is committed in a spiritual cause, the spiritual judge hath authority to inflict a canonical punishment, and prohibition will not go. *Gibf.* 1013. *1 Ough.* 9.

For by the statute of *Circumspecte agatis*, 13 *Ed. 1. st. 4.* — For breaking an oath, it hath been granted, that it shall be tried in a spiritual court, when money is not demanded, but a thing done for the punishment of sin; in which case the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.

For altho' the case be spiritual, and the perjury is committed in the spiritual court; yet the judge there can only punish *pro salute animæ*: but the party grieved by such perjury, must recover his damages at the common law. *Gibf.* 1013.

Perjury.

In the statute of perjury, 5 *Eliz. c. 9.* there is a proviso, that the same shall not extend to any spiritual or ecclesiastical court, but such offender as shall be guilty of perjury or subornation of perjury, shall and may be punished by such usual and ordinary laws as heretofore hath been, and yet is used and frequented in the said ecclesiastical courts. *f. 11.*

In the statute of the 5 *Eliz. c. 23.* concerning the writ de excommunicato capiendo, perjury in the ecclesiastical court is specified as an offence (amongst others) for which a person may be excommunicated.

E. 11 W. Bishop of *St David's* case. By Holt chief justice: It hath been a question, whether perjury in the spiritual court can be tried in the temporal; and in all the cases where it hath been, the persons have been acquitted, and so it hath been ended, but it is not yet settled. *L. Raym. 451.*

M. 4 Geo. K. and Lewis. An information was moved for against a clergyman, for perjury at his admission to a living, upon an affidavit that the presentation was simoniacal. But the court refused to grant it, till he had been convicted of the simony. *Str. 70.*

Perpetual curate. See **Curate**.

Pews in the church. See **Church**.

Peter-pence.

PETER-PENCE was an annual tribute of one penny, paid at Rome out of every family, at the feast of St Peter. *Gibf. 87.*

Physicians.

1. **WETHERSHED.** Forasmuch as the soul is far more precious than the body, we do prohibit under the pain of anathema, that no physician for the health of the body, shall prescribe to a sick person any thing which may prove perillous to the soul. But when it happens that he is called to a sick person, he shall first of all effectually persuade them to send for the physicians of the soul; that after the sick person hath taken care for his spiritual medicament, he may with better effect proceed to the cure of his body. And the transgressors of this constitution, shall not escape the punishment appointed by the council. *Lind. 330.*

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That is, by the council of Lateran under Innocent the third; from the canons of which council this constitution was taken: which punishment is, a prohibition from the entrance of the church until they shall have made competent satisfaction. *Johns. Wetherst.*

2. By the 3 *H. 8. c. 11.* Forasmuch as the science and cunning of physick and surgery (to the perfect knowledge whereof be requisite both great learning and ripe experience) is daily within this realm exercised by a great multitude of ignorant persons, of whom the greater part have no manner of insight in the same nor in any other kind of learning, some also can no letters on the book; so far forth, that common artificers, as smiths, weavers, and women, boldly and accustomedly take upon them great cures, and things of great difficulty, in the which they partly use sorcery and witchcraft, partly apply such medicines unto the disease as be very noxious, and nothing meet thereof; to the high displeasure of god, great infamy to the faculty, and the grievous hurt and destruction of many of the king's liege people, most especially of them that cannot discern the uncunning from the cunning: Be it therefore (to the surety and comfort of all manner of people) enacted, that no person within the city of London, nor within seven miles of the same, shall take upon him to exercise and occupy as a physician or surgeon, except he be first examined approved and admitted by the bishop of London or by the dean of Paul's for the time being, calling to him or them four doctors of physick, and for surgery other expert persons in that faculty, and for the first examination such as they shall think convenient, and afterwards always four of them that have been so approved; upon pain of forfeiture, for every month that they do occupy as physicians or surgeons, not admitted nor examined after the tenor of this act, of 5*l.* half to the king, and half to him that shall sue. And that no person out of the said city and precinct of seven miles of the same, except he have been as is aforesaid approved in the same, take upon him to exercise and occupy as a physician or surgeon, in any diocese within this realm; unless he be first examined and approved by the bishop of the same diocese, or (he being out of the diocese) by his vicar general, either of them calling to them such expert persons in the said faculties as their discretion shall think convenient, and giving their letters testimonial under their seal to him that they shall so approve; upon like pain to them that occupy contrary to this act (as is above said), to be levied and employed after the form before expressed.

Provided, that this act shall not be prejudicial to the universities of Oxford or Cambridge, or either of them; or to any privileges granted to them.

3. By the 14 & 15 *H. 8. c. 5.* Physicians in London and within seven miles thereof are incorporated; with power to make statutes for the government of the society: and no physician shall practise within the said limits, till admitted by the president and community under their common seal; on pain of 5*l.* a month, half to the king, and half to the society. And four censors are to be chosen yearly, who shall have the ordering of the

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the practitioners within the said limits; and the supervising of medicines, with power to fine and imprison.

And it is further enacted, that whereas in dioceses of England out of London, it is not light to find alway men able sufficiently to examine (after the statute) such as shall be admitted to exercise physick in them; therefore no person shall be suffered to exercise or practise in *physick* through England, until such time as he be examined at London, by the president and three of the elects of the said society; and to have from them letters testimonial of their approving and examination; except he be a graduate of Oxford or Cambridge, which hath accomplished all things for his form without any grace.

But as to *surgeons*, the law remaineth as before; that they shall be licensed by the bishop of the diocese or his vicar general respectively.

In the case of the college of physicians against *Levett, E. 11 W.* The plaintiffs brought an action of debt against the defendant for 251, for having practised physick within London five months without licence. Upon nil debet pleaded, it was tried before Holt chief justice at Guildhall; and the defence was, that he was a graduate doctor of Oxford. But it was ruled by Holt, upon consideration of all the statutes concerning this matter, that he could not practise within *London* or seven miles round, without licence of the college of physicians. And by his direction a verdict was given for the plaintiffs. *L. Raym. 472.*

And the like was adjudged on a special verdict, *M. 4 Geo. 1717*; in the case of Dr *West*, who was a graduate of Oxford. *id.*

4. By the 34 & 35 *H. 8. c. 8.* Where by the statute of 3 *H. 8. c. 11.* for the avoiding of forceries witchcrafts and other inconveniences, it was enacted, that no person within the city of London nor seven miles thereof should take upon him to exercise as physician or surgeon, except he be first examined approved and admitted by the bishop of London and other, under the penalties in the same act mentioned; since the making of which act, the company and fellowship of surgeons in London, minding only their own lucre, and nothing the profit or ease of the diseased or patient, have sued and troubled divers honest persons, as well men as women, whom god hath endued with the knowledge of the nature kind and operation of certain herbs roots and waters, and the using and ministering of them to such as be pained with customable diseases, as womens breasts being sore, a pin and the web in the eye, uncomes of hands, burning, scaldings, sore mouths, the stone, strangury, faucelim, and morphew, and such other like diseases; and yet the said persons have not taken any thing for their pains or cunning, but have ministered the same to poor people only for neighbourhood and god's sake, and of pity and charity; and it is now well known, that the surgeons admitted will do no cure to any person, but where they shall know to be rewarded with a greater sum or reward than the cure extendeth unto; for in case they would minister their cunning unto sore people unrewarded, there should not so many rot and perish to death for lack or help of surgery, as daily do; but the greater part of surgeons admitted, be much more

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to be blamed, than those persons that they trouble; for altho' the most part of the persons of the said craft of surgeons have small cunning, yet they will take great sums of money, and do little therefore, and by reason thereof they do oftentimes impair and hurt their patients, rather than do them good: In consideration whereof, and for the ease comfort and health of the king's poor subjects, it is enacted, that it shall be lawful to every person being the king's subject, having knowledge and experience of the nature of herbs roots and waters, or of the operation of the same, by speculation or practice, to use and minister in and to any outward sore, uncome, wound, apostemations, outward swelling or disease, any herb or herbs, ointments, baths, pultes, and emplasters, according to their cunning experience and knowledge, in any of the diseases sores and maladies aforesaid, and all other like the same, or drinks for the stone and strangury, or agues; without suit, trouble, penalty, or loss of their goods: the foresaid statute, or any other act, ordinance, or statute notwithstanding.

Pie.

THE *pie*, was a table to find out the service belonging to each day.
Gibf. 263.

Pious uses. See Charitable uses.

Plays in the church or churchyard. See Church.

Plays in the universities. See Colleges.

Plough-alsms.

THE *plough-alsms* was a kind of oblation, being most commonly a penny for every plough, to be paid between easter and whitfuntide. 2 *Still. 177.*

Plurality.

Restraints of
plurality by
canon.

I. **B**Y a canon made in the council of Lateran, holden under pope Innocent the third, in the year of our lord 1215, it is ordained, that *whosoever shall take any benefice with cure of souls, if he shall before have obtained a like benefice, shall ipso jure be deprived thereof; and if he shall contend to retain the same, he shall be deprived of the other: and the patron of the former, immediately after his accepting of the latter, shall bestow the same upon whom he shall think worthy.* Hughes, c. 16. Gibf. 903.

Othob. *Before institution, it shall be inquired, whether the presentee hath any other benefice with cure of souls; and if he hath such benefice, it shall be inquired, whether he hath a dispensation: And if he hath not a sufficient dispensation, he shall by no means be admitted, unless he do first make oath, that immediately upon his taking possession of the benefice unto which he is instituted, he will resign the rest. Whereupon he who granteth institution shall immediately give notice to the bishops in whose dioceses such former benefices shall be, and also to the patrons that they may dispose of the same.* Athon, 129.

Othob. *When confirmation is to be made of the election of a bishop, amongst other articles of inquiry and examination according to the direction of the canons, it shall be diligently inquired, whether he who is elected had before his election several benefices with cure of souls; and if he be found to have had such, it shall be inquired whether he hath had a dispensation; and whether the dispensation (if he shall exhibit any) is a true dispensation, and extendeth to all the benefices which he possessed.* Athon, 133.

According to which constitution we find, in the times of the archbishops Peccham and Winchelsea, that confirmation was denied to three bishops, by reason of pluralities without proper dispensation. Gibf. 905.

Peccham. *He who shall have more benefices than one with cure of souls, without dispensation, shall hold only the last; and if he shall strive to hold the rest, he shall forfeit all. And it is further decreed, that he who shall take more benefices than one, having cure of souls, or being otherwise incompatible, without dispensation apostolical, either by institution or by title of commendam, or one by institution and another by commendam, except they be held in such manner as is permitted by the constitution of Gregory published in the council of Lions; shall be deprived of them all, and be ipso facto excommunicated, and shall not be absolved but by us or our successors or the apostolick see.* Lind. 137.

Having cure of souls] Whether it be a cathedral or parochial church, or a chapel having cure of the parishioners, either de jure or de facto; so that there be a parish, wherein he can exercise parochial rites: also, whether

whether it be a dignity, or office, or church; as there are many arch-presbyters, archdeacons, and deans, who have no church of their own, yet they have jurisdiction over many churches. *Lind.* 135.

Or being otherwise incompatible] Namely, dignities, parsonages, and other ecclesiastical benefices, which require personal residence either by statute, privilege, or custom. *Lind.* 137.

In such manner as is permitted by the constitution of Gregory] Namely, that he to whom the benefice is granted in commendam be of lawful age, and a priest; and that it be one only, and of evident necessity, or advantage to the church, and to continue no longer than for six months. *Lind.* 137.

And shall not be absolved but by us or our successors, or the apostolick see] And by another constitution of the same archbishop, if any shall otherwise absolve them, they shall be accursed. *Lind.* 339.

But after all, these canons and constitutions were not intended to hinder or take away pluralities; but to render dispensations necessary: for a clerk was allowed to hold as many dignities or benefices as he could get, with the pope's dispensation; which was easily obtained from his legate or nuncio residing here, on paying the sums required. *Johns.* 91.

2. By the 21 H. 8. c. 13. *If any person having one benefice with cure of souls, being of the yearly value of 8l. or above, accept and take any other with cure of souls, and be instituted and inducted in possession of the same; then and immediately after such possession had thereof, the first benefice shall be adjudged in law to be void. And it shall be lawful to every patron, having the advowson thereof, to present another, and the presentee to have the benefit of the same, in such like manner and form as tho' the incumbent had died or resigned; any licence, union, or other dispensation to the contrary notwithstanding: and every such licence, union, or dispensation to be obtained contrary to this present act, of what name or quality soever they be, shall be utterly void and of none effect. And if any person or persons, contrary to this present act, shall procure and obtain at the court of Rome or elsewhere any licence, union, toleration, or dispensation, to receive and take any more benefices with cure than is above limited; every such person or persons, so suing for himself, or receiving and taking such benefice by force of such licence union toleration or dispensation, that is to say, the same person or persons only, and none other, shall for every such default incur the penalty of 20l, and also lose the whole profits of every such benefice or benefices as he receiveth or taketh by force of any such licence, union, toleration, or dispensation; half to the king, and half to him that will sue for the same in any of the king's courts.* f. 9, 10, 11.

If any person] Altho' bishops are not within this act, otherwise than as commendataries, that is, having two benefices with cure, either by re-rainer, or de novo; yet it is a general law, which ought to be taken notice of without pleading, by the same reason that the statute of the

13 *Eliz. c. 10.* concerning leases of the clergy, hath often been adjudged a general law, tho' bishops are not included in it. *Gibf. 906.*

Having one benefice] So as that he hath been instituted, altho' he hath not been inducted into the same; for if he taketh a second benefice after such institution, the first is void, as much as if it had been taken after induction also. *Gibf. 906.*

Of the yearly value of 81 or above] According to the valuation in the king's books; for so it was unanimously resolved by the court of common pleas in the 23 C. 2. and before that in the 8 C. 1. by the same court, in the case of *Drake and Hill*: which therefore is at this day taken for law, notwithstanding the two more ancient opinions to the contrary, one in *Dyer, 7 Eliz.* and the other in the case of *Bond and Tricket* in the 43 *Eliz.* *Gibf. 906. Wals. c. 2.*

Of 81 or above] If such first benefice is under the yearly value of 81 in the king's books, the same is not within this statute, but rests upon the law of the church as it was before the statute. *Gibf. 906.*

Accept and take any other] It is not material in this case, of what value the second church is, or whether rated in the king's books at all; for the voidance will take place equally when the second is under, as when it is above 81 a year. *Gibf. 906.*

And be instituted and inducted in possession of the same] Altho' the expression is copulative, and should therefore imply, that the voidance which follows thereupon doth not take place till after induction; yet it hath been often adjudged, that if one is instituted, and then obtains dispensation, and after that is inducted, the dispensation comes too late; not only because by institution the church is full of the incumbent, and one cannot have a dispensation to *take and receive* (as the words of the act are) what he had before; but also because by institution he hinders others from being presented; and so by obtaining institution to many churches, with sequestration of the profits of them, the intent of this statute might be utterly frustrated. *Gibf. 906.*

And it shall be lawful to every patron, having the advowson thereof, to present another] If the first benefice was of less value than 81. a year; yet by his acceptance of a second with cure, it is at this day in jure void by the received canon law: and there needs not any sentence declaratory in the spiritual court, to make way for the patron's presentation; for he may immediately thereupon (without either deprivation or resignation) present a new incumbent to the said church, and require his admission; and if the bishop doth refuse the patron's clerk, a quare impedit lies for the patron. But some opinions are, that the church is not void but by deprivation; and that the taking of a second benefice with cure in such case, until deprivation, is no cession: But this is to be understood, that it is no cession to the disadvantage of the patron; so as to make a layle incur from the time of such cession, no notice having

having been given to the patron thereof. For until after such clerk shall have been actually deprived of his first benefice, and notice thereof given to the patron; he, tho' he may, yet he need not to present: but then after such deprivation, the church is void in facto and in jure, so that he must at his peril present. *Watsf. c. 2.*

And if an incumbent of a church with cure under 8l a year doth take a second benefice with cure, in which he is also instituted and inducted (no dispensation being obtained for the holding of them both), by which the first is void against the patron, so that he may present (as before is shewed), but before the patron doth present upon such avoidance, the archbishop, by force of this statute, doth grant to the clerk a licence perinde valere, to hold the first with the second benefice; this is not a good licence (altho' confirmed according to the statute) to take away the patron's presentment, tho' his church was only void by force of a canon, and not by statute: for by the canon the first benefice was so void, that the patron might have presented before any deprivation; and after the patron hath once a title to present, this title cannot be taken away from him by a subsequent licence, unless such a licence could make a void church full. *Watsf. c. 2.*

But if any person having one benefice with cure of souls, being of the yearly value of 8l or above, do accept and take another benefice with cure of souls, and be instituted and inducted in possession of the same (although the last benefice be but of 3l value); immediately after such possession had thereof, the first benefice is not only void in law but in facto also: so that the patron thereof must present to a living of such value, so void, within six months (without expecting notice from the ordinary) to avoid the lapse; it being then not only void by canon law, but also by act of parliament, in which all men are parties. But he need not (unless notice be duly given) present till such time as his clerk is inducted into another benefice. For tho' by his institution he hath the cure of souls, and the church is full to several purposes; yet the words of the statute are, "and be instituted and inducted in possession of the same;" so that until he be inducted, there is no cession by this statute, but only by the canon law; by which law, in such case also he may be deprived. *Watsf. c. 2.*

But the patron, if he pleaseth, may present so soon as his clerk is instituted into another benefice, incompatible, altho' he hath no notice from the ordinary of any cession or deprivation made of the first benefice, by reason of his acceptance of another by institution; and tho' he was only instituted into the first benefice, and not inducted: or else, if he pleaseth, he may sue such person in the court christian, to have him deprived by sentence, in this, as well as in any other case where the living is void by the canon law only. *Watsf. c. 2.*

But this rule, that the accepting of a second benefice that is incompatible, doth make a cession or absolute avoidance of the former, hath its exceptions: As, 1. If a person having a benefice incompatible, be admitted, instituted, and inducted into a second benefice incompatible

also, but doth not subscribe the articles according to the statute; his first benefice is not void, because by reason of that neglect, he was never incumbent of the second. The like law seemeth to be, if a man hath obtained a second benefice incompatible with his former, by a simoniacal contract; for in such case also, his presentation or collation, institution and induction, are utterly void and of none effect in law: However, the canon law, unless a pardon intervene, will reach him in this case of simony; for by that he may be deprived. 2. If he that hath a benefice incompatible, before he takes another, being duly qualified, doth obtain a sufficient dispensation, to hold at one and the same time more than one of such benefices as are incompatible: for by dispensation, a man at this day with us (tho' he be not qualified by degree in the university, retainer, or birth) may hold as many benefices without cure, of what value soever, as he can get; all of them, or all but the last, being under the value of 8l a year. *Watf. c. 3.*

Any licence, union, or other dispensation to the contrary notwithstanding] The union here spoken of, is meant of a temporary union for the life of the incumbent; instances of which are common, both before and since the reformation. *Gibf. 907.*

And every such licence, union, or dispensation, contrary to this act, shall be utterly void and of none effect] One being possessed of two benefices by dispensation according to this statute, did afterwards by a triality (or a dispensation to hold three) obtain a third benefice, and enjoyed all the three; and Dyer says, that divers justices and serjeants were of opinion, that the first of the three was void, and the profits of the third forfeited by this clause, and that only the second remained to him. *Gibf. 907. Dyer 327.*

Also, in the case of the king against the bishop of *Chichester*, where one had two benefices with cure, by dispensation, and then took a third with cure (and, as it seemeth, without dispensation); it is said to have been adjudged, that both the two first should be void. *Gibf. 907. Ney 149.*

And the words of Hobart are; I hold, if a man take a triality, which is not allowed him, he cannot by that take two benefices, because his dispensation is void. *Hob. 158.*

The rule of the canon law is, that if a person having two benefices incompatible, shall by dispensation accept a third, and be in quiet possession thereof, the two first shall be ipso facto void. *Gibf. 907.*

Upon all which considerations, if a third benefice is to be taken by one who already holds two by dispensation, the best way is to determine which of the two he will hold with the third, and to make the other void by resignation, before he accepts the third. *Gibf. 907.*

Shall procure and obtain at the court of Rome] In the catalogue of faculties which were grantable at Rome in the times of popery (besides the common dispensations to hold two, three, or four benefices incompatible)

are

are these three that follow: 1. A dispensation to whatsoever and how many soever benefices incompatible, to the value of 500l a year. 2. To the value of 1000l a year. 3. Without any restriction: The price of each rising gradually, according to the degree of favour and profit. *Gibf. 907.*

And how much the practice, as well as law, of holding pluralities, was altered by this statute, from what it was whilst the right of dispensation rested in the pope; will appear (amongst many other such like which might be mentioned) from the famous instance of Bogo de Clare, rector of St Peter's in the East in Oxford; who in the eighth year of king Edward the first, was presented by the earl of Gloucester to the church of Wynton in the county of Northampton, and obtained a dispensation to hold the same, together with one church in Ireland, and fourteen other churches in England in nine different dioceses; all which benefices were valued at that time at 268l. 6s. 8d'. *Ken. Par. Ant. 292. Gibf. 907. Wood's Hist. et Antiq. Univ. Oxon. 116.*

3. By the aforesaid statute of the 21 H. 8. c. 13. it is enacted, that *all Dispensation spiritual men being of the king's council, may purchase licence or dispensation, of plurality to take, receive, and keep three parsonages or benefices with cure of souls; and by statute. all other being the king's chaplains, and not sworn of his council; the chaplains of the queen, prince, or princess, or any of the king's children, brethren, sisters, uncles, or aunts, may semblably purchase licence or dispensation, and receive and keep two parsonages and benefices with cure of souls: Every archbishop and duke may have six chaplains; every marquiss and earl, five; viscount, and other bishop, four; chancellor of England for the time being, baron and knight of the garter, three; every dutchess, marchioness, countess, and baroness, being widows, two; treasurer, controller of the king's house, the king's secretary, and dean of his chapel, the king's amner, and master of the rolls, two; chief justice of the king's bench, one; warden of the five ports, one; whereof every one may purchase licence or dispensation, and receive have and keep two parsonages or benefices with cure of souls. And the brethren and sons of all temporal lords, which are born in wedlock, may every of them purchase licence or dispensation to receive have and keep as many parsonages or benefices with cure, as the chaplains of a duke or archbishop. And the brethren and sons born in wedlock of every knight, may every of them purchase licence or dispensation, and receive take and keep two parsonages or benefices with cure of souls. f. 13. . . . 21.*

Parsonages or benefices] Dispensations were granted heretofore, for such a number of benefices, without specifying the particulars; and sometimes with an additional power to exchange, and take others; only keeping within the number in point of possession at one and the same time. But the later and safer way hath been, to grant dispensation only for preventing the voidance of a benefice in possession, by the taking of a second, however these words may be capable of a larger interpretation. *Gibf. 907.*

Every duke, marquiss, earl, &c.] And altho' such duke, marquiss, earl, or the like, be minors, and under age; yet they may retain chaplains within this act: as was adjudged in the case of the queen and the bishop of Salisbury; even tho' the lord admiral, in whose custody the minor was, might retain chaplains in his own right. 4 Co. 119. Gibf. 908.

But if the son and heir apparent of a baron, or such like, retaineth a chaplain, and his father dieth, and the chaplain purchaseth dispensation, such retainer will not avail, because it was not available at the beginning. 4 Co. 90.

And if the person who retained dies, or is removed, or is attainted, before any effect of the retainer; it is gone, and shall have no effect afterwards: but if it taketh effect before, it continues good, notwithstanding death, or attainder, or removal. Gibf. 908.

Brethren and sons born in wedlock of every knight] But not brethren or sons of baronets; which dignity hath been created since the making of this act. Gibf. 908. That is, if such baronets are not also knights.

S. 22. *Provided, that the said chaplains so purchasing, taking, receiving, and keeping benefices with cure of souls, as is aforesaid, shall be bound to have and exhibit, where need shall be, letters under the sign and seal of the king or other their lord and master, testifying whose chaplains they be; and do not to enjoy any such plurality of benefices by being such chaplain: any thing in this act notwithstanding.*

Letters under the sign and seal] Which may be in this form: " Know all men by these presents, that I the right honourable A. lord ——— baron of ——— have admitted, constituted, and appointed the reverend B. C. clerk, my domestick chaplain; to have, hold, and enjoy all and singular the benefits, privileges, liberties, and advantages, due and of right granted to the chaplains of noblemen by the laws and statutes of this realm. Given under my hand and seal, the ——— day of ——— in the year &c."

And the same being under hand and seal, it seemeth that if there shall be lawful cause to discharge him, such discharge must be also under hand and seal: Which may be to this effect; " Whereas I the right honourable A. lord ——— baron of ——— by writing under my hand and seal, bearing date the ——— day of ——— did admit, constitute, and appoint B. C. clerk, my domestick chaplain; to hold and enjoy all benefits, privileges, and advantages belonging to the same: Now by these presents, I the said A. lord ——— do for divers good and lawful causes and considerations, dismiss and discharge the said B. C. from my service as domestick chaplain, and from all privileges and advantages to him granted as aforesaid. Given under my hand and seal, the ——— day of ——— in the year &c."

S. 23. *And all doctors and bachelors of divinity, doctors of law, and bachelors of law canon, and every of them, which shall be admitted to any of the said degrees by any of the universities of this realm, and not by grace only, may purchase licence, and take, have, and keep two parsonages or benefices with cure of souls.*

Bachelors

Bachelors of law canon] Dr Ayliffe says, that no degree in the canon law hath been taken since the reformation. *Ayl. Par.* [418.]

And not by grace only] This seems to be explained by a like expression in the statute of the 14 H. 8. c. 5. intitled, "The privileges and authority of physicians in London;" by which, provision is made for the examination of physicians by the president and elects, *except he be a graduate of Oxford or Cambridge, which hath accomplished all things for his form, without any grace*; that is, (as it seemeth) hath performed the statutable exercises, in order to such degree, without any favour or dispensation therein. *Gibf.* 908, 909.

S. 24. *Provided, that every archbishop, because he must occupy eight chaplains at consecrations of bishops; and every bishop, because he must occupy six chaplains at giving of orders and consecration of churches, may every of them have two chaplains over and above the number above limited unto them; whereof every one may purchase licence or dispensation, and take receive and keep as many parsonages and benefices with cure of souls, as is before assigned to such chaplains.*

Dr Ayliffe says, that notwithstanding this clause, bishops can only qualify this number for the purposes here mentioned, of ordination and consecration; but that they can qualify no more than four, for a licence or dispensation:—But this seemeth contrary to the words of the clause as above recited. *Ayl. Par.* [418.]

S. 25. *Provided also, that no person to whom any number of chaplains or any chaplain, by any of the provisions aforesaid is limited, shall in any wise, by colour of any of the same provisions, advance any spiritual person or persons, above the number of them appointed, to receive or keep any more benefices with cure of souls, than is above limited by this act, any thing specified in the said provisions notwithstanding; and if they do, then every such spiritual person or persons, so advanced above the said number, to incur the penalty contained in this act.*

Above the number] Altho' a chaplain retained above the number, be promoted before those who were duly retained according to the statute; such retainer (above the number) shall neither avail him, nor divest those who were duly retained of the right of purchasing dispensation: nor shall he ever have benefit by his retainer (even tho' the rest are dead) unless it be renewed upon the death of one of those who made up the statutable number: inasmuch as the retainer was null ab initio; and a chaplain once legally qualified, cannot be discharged at pleasure, to make way for others. *Gibf.* 909.

So if a baron (who can have but three chaplains) doth qualify three accordingly, and they being advanced to pluralities, he upon displeasure or for other cause doth dismiss them from their attendance, yet they are his chaplains at large, and may hold their pluralities for their lives: and tho' he may entertain as many other as he will, yet he cannot qualify any of them to hold a plurality, whilst the first three are living. And so of others.

others. But as any of the three first die; he may qualify others, if so be he retain them anew after the death of the first. *Watf. c. 3.*

If a baron, who may retain three chaplains as aforesaid, be made warden of the cinque ports (who may have a chaplain in respect of his office), yet shall he have but three; and if a baron hath three, and be made an earl, yet he shall have but five in all; and so of the rest: because the statute is to be taken strictly against pluralities. *Gibf. 909.*

S. 29. Provided, that it shall be lawful to every spiritual person, being chaplain to the king, to whom it shall please the king to give any benefices or promotions spiritual, to what number soever it be, to accept and take the same, without incurring the penalty and forfeiture of this statute.

Being chaplain to the king] It hath been resolved in the court of king's bench, that a chaplain extraordinary is not a chaplain within this statute, but only the chaplains in ordinary; that is, not one who has only an entry of his name made in the book of chaplains, but one who has also a waiting time. *Gibf. 909. 1 Salk. 162.*

To accept and take the same] Without previous dispensation; which the king himself, as supreme ordinary, hath power to grant, and his presentation of his own chaplain imports the granting of it. But if the king's chaplain be presented to a second benefice by a subject, a dispensation is necessary, and must be obtained before his institution to the second living. *Gibf. 909. 1 Salk. 161.*

S. 31. Provided also, that no deanry, archdeaconry, chancellorship, treasurer'ship, chanter'ship, or prebend in any cathedral or collegiate church, nor personage that hath a vicar endowed, nor any benefice perpetually appropriate, be taken or comprehended under the name of benefice having cure of souls, in any article afore specified.

S. 33. Provided also, that every dutchess, marquess, countess, baroness, widows, which have taken, or that hereafter shall take any husbands under the degree of a baron, may take such number of chaplains, as is above limited to them being widows, and that every such chaplain may purchase licence to have and take such number of benefices with cure of souls, in manner and form as they might have done, if their said ladies and mistresses had kept themselves widows.

Being widows] And tho' they marry, the retainer before marriage stands good, and shall have its effect after marriage. If they marry under the degree of a baron, they are specially provided for in this clause, and if they marry a baron, or above that degree, my lord Coke has laid down the law in the following words: If a woman baroness retaineth two chaplains according to the statute, and afterwards taketh one of the nobility to husband; the retainer of these two chaplains remaineth, and they without new retainer may take two benefices; for their retainer was not ended by the marriage. *4 Co. 119. Gibf. 909.*

Regulation of
dispensations
by canon.

4. Can. 41. No licence or dispensation for the keeping of more benefices with cure than one, shall be granted to any, but such only as shall be thought very

very well worthy for his learning, and very well able and sufficient to discharge his duty; that is, who shall have taken the degree of a master of arts at the least in one of the universities of this realm, and be a publick and sufficient preacher licensed. Provided always, that he be by a good and sufficient caution bound to make his personal residence in each of his said benefices for some reasonable time in every year; and that the said benefices be not more than thirty miles distant asunder; and lastly, that he have under him, in the benefice where he doth not reside, a preacher lawfully allowed, that is able sufficiently to teach and instruct the people.

Very well worthy for his learning] So is the tenor of the Lateran council under Innocent the third against pluralities; where it is allowed, in this particular case and in no other, that the see apostolic may dispense with persons of sublime abilities and learning, that they may be honoured with more benefices than one. *Gibf. 910.*

A publick and sufficient preacher licensed] With regard to his being thus qualified (which in those days was not a common qualification), there is usually a proviso in the body of the dispensation, that in either of the churches he preach thirteen sermons every year, according to the orders of the church of England published in that behalf, and therein handle the word of god religiously and reverently. *Gibf. 910.*

Bound to make his personal residence for some reasonable time] In every dispensation to hold two benefices, there is a proviso, that in that benefice from which he shall be the more absent, he shall exercise hospitality for at least two months every year: And that proviso being evidently founded on this canon; every pluralist, who doth not observe it, is punishable by ecclesiastical censures. *Gibf. 911.*

Not more than thirty miles distant] Heretofore, it was usual to obtain licences from the king, to take two benefices beyond the distance of thirty miles, by way of dispensation with this canon; and in such cases, we find this clause in the faculties granted by the archbishop, "The king's licence for distance beyond thirty miles having been first granted to you," or the like; by reason of which licence and clause, they have been usually called *royal dispensations*. But none of these (as it seemeth) have been granted since the revolution; it having been then set forth in the declaration of rights, 1 W. sess. 2. c. 2. that the power of suspending laws or the execution of laws, by regal authority, without consent of parliament, is illegal; and with respect to acts of parliament in particular, it is enacted by that statute, that no dispensation by non-obstante of any statute shall be allowed, unless the same shall be specially provided for in such statute. *Gibf. 911.*

That he have under him, in the benefice where he doth not reside, a preacher lawfully allowed] In pursuance of this canon (and not of any thing in the statute), a clause to the like purpose is inserted in the faculty or dispensation. *Gibf. 911.*

And it is further provided by *Canon 47.* that whosoever hath two benefices, shall maintain a preacher licensed, in the benefice where he doth not reside; except he preach himself at both of them usually.

Manner of obtaining a dispensation.

5. The method which a presentee must pursue, in order to obtain a dispensation, is as followeth:

He must obtain of the bishop, in whose diocese the livings are, two certificates of the values in the king's books, and the reputed values and distance of such livings; one certificate for the archbishop, and the other for the lord chancellor. And if the livings lie in two dioceses, then two certificates, as aforesaid, are to be obtained from each bishop, each certifying the value in the king's books, and the reputed value, of the living in his own diocese; and both of them, the reputed distance of the two livings.

Which certificates may be in this form;

"To the most reverend father in god, Thomas, by divine providence lord archbishop of Canterbury, primate of all England and metropolitan:

Whereas *A. B.* clerk, master of arts, vicar of *C.* in the county of *D.* and in my diocese of *E.* is presented to the rectory of *F.* in the county and diocese aforesaid; These are therefore to certify your grace, that the said vicarage of *C.* is valued in the king's books at ——— is of the reputed yearly value of ——— That the said rectory of *F.* is valued in the king's books at ——— is of the reputed yearly value of ——— And that they are distant from each other about ——— miles. Witness my hand the ——— day of ———"

The like to the lord high chancellor of Great Britain.

He must also exhibit to the archbishop, his presentation to the second living.

And also bring with him two papers of testimonials from the neighbouring clergy, concerning his behaviour and conversation; one for the archbishop, and the other for the lord chancellor.

The form of which testimonials may be thus;

"To the most reverend father in god, Thomas, by divine providence, lord archbishop of Canterbury, primate of all England, and metropolitan:

We whose names and seals are hereunto subscribed and set, do humbly certify your grace, that we have personally known the life and behaviour of *A. B.* clerk, master of arts, vicar of *C.* in the county of *D.* and diocese of *E.* for the space of three years now last past; that he hath, during the said time, been of good and honest life and conversation, a faithful and loyal subject to his majesty king George the third, and hath not (so far as we know) held, written, or taught any thing, but what the church of England approves of and maintains. In witness whereof, we have hereunto

hereunto set our hands and seals, this — day of — in the year of our lord —.”

A. B. rector of A.
C. D. vicar of B.
E. F. vicar of C.”

And he must in like manner exhibit to the archbishop his letters of orders of deacon and priest.

And he must also exhibit to the archbishop, a certificate of his having taken the degree of master of arts at the least, in one of the universities of this realm, under the hand of the register of such university.

And in case he be not doctor or batchelor of divinity, nor doctor of law, nor batchelor of canon law; he is to procure a qualification (according to the form above expressed) as chaplain to some nobleman, or to some other person impowered by law to grant qualifications for pluralities (which is also to be duly registred in the faculty office) in order to be tendred to the archbishop, according to the statute. And if he hath taken any of the aforesaid degrees, which the statute allows as qualifications; he is to procure a certificate thereof in the manner before mentioned, and to exhibit the same to the archbishop. *Eden, 444.*

After which, his dispensation is made out at the faculty office; where he gives security according to the direction of the canon. And afterwards he must repair to the lord chancellor, for confirmation under the broad seal.

All which being done, he is then to apply himself to the bishop of the diocese where the living lies, for his admission and institution. *Deg.*

p. 1. c. 4.

6. In pursuance of the statute and canons aforegoing, the form of a Form of a dispensation is usually as followeth: *penitentiary*

“ Thomas, by divine providence archbishop of Canterbury, primate
“ of all England and metropolitan, by authority of parliament lawfully
“ impowered for the purpose herein written: To our beloved in Christ
“ A. B. clerk, master of arts, of — college in the university of —
“ and also chaplain to the right honourable C. lord — health and
“ grace. The greater progress men make in sacred learning, the greater
“ encouragement they merit; and the more their necessities are in daily
“ life, the more necessary supports of life, they require. Upon which
“ considerations, and being moved by your supplications in this behalf,
“ We do (by virtue and in pursuance of the power vested in us by the
“ statutes of this realm) by these presents graciously dispense with you;
“ that, together with the rectory of the parish church of — in the
“ county of — and diocese of — which you now possess, the
“ annual fruits whereof, according to the valuation made in the books
“ of first fruits and tenths of ecclesiastical benefices remaining in the ex-
chequer

“chequer of our sovereign lord the king, do not exceed the sum of
 “——— you may freely and lawfully accept, and hold as long as you
 “shall live, the rectory of the parish church of —— in county of ——
 “and diocese of —— not distant from the former above —— miles
 “or thereabouts, the annual fruits whereof according to the valuation
 “aforesaid, do not exceed the sum of —— Provided always, that in
 “each of the churches aforesaid, as well in that, from which it shall
 “happen that you shall be for the greater part absent, as in the other,
 “on which you shall make perpetual and personal residence, you do
 “preach thirteen sermons every year according to the ordinances of the
 “church of England promulged in that behalf; and do therein sincerely
 “religiously and reverently handle the holy word of god; and that in
 “the benefice, from which you shall happen to be most absent, you do
 “nevertheless exercise hospitality, two months yearly; and for that time,
 “according to the fruits and profits thereof, as much as in you lieth,
 “you do support and relieve the inhabitants of that parish, especially
 “the poor and needy. Provided also, that the cure of the souls of that
 “church from which you shall be most absent, be in the mean time in
 “all respects laudably served by an able minister, capable to explain
 “and interpret the principles of the christian religion, and to declare
 “the word of god unto the people, in case the revenues of the said
 “church can conveniently maintain such minister; and that a competent
 “and sufficient salary be well and truly allowed and paid to the said
 “minister, to be limited and allotted by the proper ordinary at his dis-
 “cretion, or by us or our successors, in case the diocesan bishop shall not
 “take due care therein. Provided nevertheless, that these presents do
 “not avail you any thing, unless duly confirmed by the king’s letters
 “patent. Given under the seal of our office of faculties, this —— day
 “of &c.”

The lord chancellor’s confirmation:

“George the third, &c. To all to whom these our present letters
 “shall come, greeting: We have seen certain letters of dispensation to
 “these presents annexed; which, and every thing therein contained, ac-
 “cording to a certain act in that behalf made in the parliament of Henry
 “the eighth heretofore king of England, our predecessor, we have rat-
 “fied approved and confirmed, and for us our heirs and successors we
 “do ratify approve and confirm by these presents: So that the reverend
 “A. B. clerk, master of arts, in the letters aforesaid named, may use
 “have and enjoy, freely and quietly with impunity, and lawfully, all and
 “singular the things in the same specified, according to the force form
 “and effect of the same, without any impediment whatsoever, altho’
 “express mention of the certainty of the premisses, or of any other gifts
 “or grants by us heretofore made to the said A. B. be not made in these
 “presents; or any other thing, cause, or matter whatsoever in any wise
 “notwithstanding. In testimony whereof we have caused these our let-
 “ters to be made patent. Witness our self at Westminster, the —— day
 “of —— in the —— year of our reign.”

Plurality.

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7. By the several stamp acts; for every skin or piece of vellum or parchment, or sheet or piece of paper, on which any dispensation to hold two ecclesiastical dignities or benefices, or both a dignity and a benefice, shall be ingrossed or written, there shall be paid a treble forty shilling stamp duty.

8. By the 13 *El. c. 20.* That the livings appointed for ecclesiastical ministers may not by corrupt and indirect dealings be transferred to other uses, it is enacted, that no lease to be made of any benefice or ecclesiastical promotion with cure, or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be ordinarily resident, and serving the cure of such benefice without absence above four-score days in any one year; but every such lease, immediately upon such absence, shall cease and be void; and the incumbent so offending shall for the same lose one year's profit of his said benefice, to be distributed by the ordinary among the poor of the parish. And all chargings of such benefices with cure with any pension, or with any profit out of the same to be yielded or taken, other than rents reserved upon leases, shall be void. *f. 1.*

Provided, that every parson by the laws of this realm allowed to have two benefices, may demise the one of them upon which he shall not be most ordinarily resident, to his curate only that shall there serve the cure for him: but such lease shall endure no longer than during such curate's residence without absence above forty days in any one year. *f. 2.*

9. By the 1 *W. c. 26.* If the universities shall present or nominate to any popish benefice with cure, prebend, or other ecclesiastical living, any person who shall then have any other benefice with cure of souls; such presentation shall be void.

Polygamy.

BY the 1 *J. c. 11.* If any person within his majesty's dominions of England and Wales, being married, shall marry any person, the former husband or wife being alive; every such offence shall be felony, and the person so offending shall suffer death as in cases of felony; and shall be tried in the county where he or she was apprehended, as if the offence had been committed in such county.

Provided, that this shall not extend to any person, whose husband or wife shall be continually remaining beyond the seas for seven years together:

Or whose husband or wife shall absent him or her self the one from the other, for seven years together, in any part within his majesty's dominions, the one of them not knowing the other to be living within that time.

Provided also, that this shall not extend to any person that shall be at the time of such marriage divorced by any sentence in the ecclesiastical court.

Or

Polygamy.

Or to any person where the former marriage hath been by sentence in the ecclesiastical court declared to be void and of no effect :

Nor to any person by reason of any former marriage had or made within age of consent.

Provided also, that no attainder for this offence made felony by this act, shall work any corruption of blood, loss of dower, or disinherison of heirs.

If any person within his majesty's dominions of England and Wales] If the first marriage was beyond sea, and the latter in England, the party may be indicted here, because the latter marriage makes the offence; but if the first marriage was in England, and the latter beyond sea, it seemeth that the offender cannot be indicted here, because the offence was not within the kingdom. *Kely. 79, 80.*

Being married] This extendeth to a marriage de facto, or voidable by reason of consanguinity, affinity, or such like; for it is a marriage in judgment of law until it be avoided; and therefore tho' neither marriage be de jure, yet they are within this statute. *3 Inst. 88.*

Shall marry any person, the former husband or wife being alive] If a man marrieth a wife, and then marrieth another the former wife being living, and then such first wife dying he marrieth a third the second wife being living; this marrying of the third is not felony, because the marriage with such second wife was merely void: but otherwise it would have been, if he had married the third, the first and true wife being living. *1 H. II. 693.*

Every such offence shall be felony] And such second marriage is merely void. *3 Inst. 88.*

And the person so offending shall suffer death as in cases of felony] Yet he shall have the benefit of clergy; the same being not excluded by express words. *3 Inst. 89.*

And shall be tried] The first and true wife is not to be allowed as a witness against the husband; but it seemeth clear, that the second wife may be admitted to prove the second marriage, being not so much as his wife de facto. *1 H. II. 693.*

In the county where he or she was apprehended] This is added only cumulative; for he may be indicted where the second marriage was, tho' he be never apprehended; and so be proceeded against to outlawry. *1 H. II. 694.*

Shall not extend to any person, whose husband or wife shall be continually remaining beyond the seas for seven years together] And in this case notice that he or she is living, is not material, in respect of the commorancy beyond sea. *3 Inst. 88.*

Beyond the seas] And this, altho' it be within the king's dominions; as in New England, or Ireland. *1 H. II. 693.*

Polygamy.

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Or whose husband or wife shall absent him or her self the one from the other, for seven years together, in any part within his majesty's dominions, the one of them not knowing the other to be living within that time] So that in this case notice is material, and maketh the offence. 3 Inst. 88.

Shall not extend to any person that shall be at the time of such marriage divorced by any sentence in the ecclesiastical court] And this is intended a divorce not a *vinculo matrimonii*, for then without the aid of any proviso either may freely marry; but it must be intended of divorces *a mensa et thoro*. 1 H. H. 694.

Nor to any person by reason of any former marriage had or made within the age of consent] If the man be above fourteen and the wife under twelve, or if the wife be above twelve and the man under fourteen, yet may the husband or wife so above the age of consent disagree to the espousals, as well as the party that is under the age of consent; for the advantage of disagreement must be reciprocal. And so it was resolved by the judges and civilians, T. 42 El. in the king's bench, in a writ of error between Babington and Warner. So as if either party be within age of consent, it is no former marriage within this act. 3 Inst. 89.

H. 4 G. *Strutville's case*. By Parker chief justice: Where a woman marries a second husband, the first husband being alive, and the second not privy; as to what she acquired during the cohabitation, she shall be esteemed as a servant to the second husband, who is intitled to the benefit of her labour.

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XLVI. *Saving of the ecclesiastical jurisdiction.*

I. Papal incroachments in this realm.

1. **T**HERE doth not appear much of the pope's power in this realm before the conquest. But the pope having favoured and supported king William the first in his invasion of this kingdom, took that opportunity of enlarging his incroachments, and in this king's reign began to send his legates hither; and prevailed with Henry the first to give up the donation of bishopricks; and in the time of king Stephen gained the prerogative of appeals; and in the time of Henry the second exempted all clerks from the secular power. 1 *Haw.* 49, 50.

2. And not long after this, by a general excommunication of the king and people, for several years, because they would not suffer an archbishop to be imposed upon them; king John was reduced to such straits, that he was obliged to surrender his kingdoms to the pope, and to receive them again, to hold of him for the rent of a thousand marks. 1 *Haw.* 50.

3. And in the following reign, of Henry the third; partly from the profits of our best church benefices, which were generally given to Italians and others residing at the court of Rome, and partly from the taxes imposed by the pope, there went yearly out of the kingdom 70,000*l.* an immense sum in those days. 1 *Haw.* 50.

4. The nation, being under this necessity, was obliged to provide for the prerogative of the prince and the liberties of the people, by many strict laws; as will appear in the following sections. 1 *Haw.* 50.

II. Popish jurisdiction abolished.

1. *Art.* 37. The bishop of Rome hath no jurisdiction in this realm of England.

2. *Can.* 1. All ecclesiastical persons shall faithfully keep and observe, and (as much as in them lieth) shall cause to be observed and kept of others, all and singular laws and statutes made for restoring to the crown of this kingdom the ancient jurisdiction over the state ecclesiastical, and abolishing all foreign power repugnant to the same. And all ecclesiastical persons having cure of souls, and all other preachers and readers of divinity lectures, shall to the uttermost of their wit knowledge and learning, purely and sincerely, without any colour or dissimulation, teach manifest open and declare, four times a year at least, in their sermons and other collations and lectures, that all usurped and foreign power (forasmuch as

the same hath no establishment nor ground by the law of god) is for most just causes taken away and abolished; and that therefore no manner of obedience or subjection is due unto any such foreign power.

3. By the 26 H. 8. c. 1. *the king shall be taken as the only supreme head in earth of the church of England, and shall have and enjoy annexed to the imperial crown of this realm, all honours dignities prebeminences jurisdictions privileges authorities immunities profits and commodities to the said dignity of supreme head of the same church belonging; and shall have power, from time to time, to visit repress redress reform order correct restrain and amend all such errors heresies abuses offences contempts and enormities, which by any spiritual authority may lawfully be reformed repressed ordered redressed corrected restrained or amended; any usage, custom, foreign laws, foreign authority, prescription, or any other thing to the contrary notwithstanding.*

4. And by the 35 H. 8. c. 3. *Whereas the king hath heretofore been and is justly lawfully and notoriously known named published and declared, to be king of England France and Ireland, defender of the faith, and of the church of England and also of Ireland in earth supreme head, and hath justly and lawfully used the title and name thereof; it is enacted, that all his majesty's subjects shall from henceforth accept and take the same his majesty's style as it is declared and set forth in manner and form following; viz. Henry the eighth, by the grace of god, king of England France and Ireland, defender of the faith, and of the church of England and also of Ireland in earth the supreme head: and the said style shall be for ever united and annexed to the imperial crown of this realm.*

5. And by the 1 Eliz. c. 1. *To the intent that all the usurped and foreign power and authority, spiritual and temporal, may for ever be clearly extinguished, and never to be used or obeyed within this realm; it is enacted, that no foreign prince person prelate state or potentate, spiritual or temporal, shall at any time use enjoy or exercise any manner of power jurisdiction superiority authority prebeminence or privilege, spiritual or ecclesiastical, within this realm; but the same shall be clearly abolished for ever: any statute, ordinance, custom, constitutions, or any other matter or cause whatsoever to the contrary notwithstanding. f. 16.*

And such jurisdictions privileges superiorities and prebeminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority hath been heretofore or may lawfully be exercised or used, for the visitation of the ecclesiastical state and persons, and for reformation order and correction of the same, and of all manner of errors heresies schisms abuses offences contempts and enormities, shall for ever be united and annexed to the imperial crown of this realm. f. 17.

And for the utter extinguishments of all foreign and usurped power and authority, it is enacted; that if any person shall by writing, printing, teaching, preaching, express words, deed or act, advisedly maliciously and directly affirm hold stand with set forth maintain or defend the authority prebeminence power or jurisdiction, spiritual or ecclesiastical, of any foreign prince prelate person state or potentate whatsoever, heretofore claimed used or usurped within this realm; or shall advisedly maliciously and directly put in ure or execute any thing,

thing, for the extolling advancement setting forth maintenance or defence of any such pretended or usurped jurisdiction power prebeminence and authority, or any part thereof; he, his abettors aiders procurers and counsellors, being thereof attainted according to the true order and course of the common laws of this realm, shall for the first offence forfeit to the king all his goods and chattels, as well real as personal; and if he have not goods worth 20*l.* he shall also be imprisoned for a year; and also all the ecclesiastical promotions of every spiritual person so offending shall be void: for the second offence shall incur a *præmunire*: and for the third offence shall be guilty of high treason. But no person shall be molested for any offence by preaching teaching or words, unless he be indicted within one half year. And no person shall be indicted or arraigned for any offence adjudged by this act, unless there be two sufficient witnesses or more, to testify the offence; and the said witnesses, or so many of them as shall be living, and within the realm at the time of the arraignment, shall be brought forth in person face to face to give evidence, if the party require it. And if any person shall happen to give relief aid or comfort, to a person offending in any such case of *præmunire* or treason; this shall not be taken to be an offence, unless there be two sufficient witnesses openly to testify, that the person had notice and knowledge of the offence committed. *f. 27, 28, 29, 30, 31, 37, 38.* And by the 23 *El. c. 1. f. 8.* The justices of the peace may inquire of offences within this act (but not hear and determine the same), within a year and a day after the offence committed.

6. And by the 5 *El. c. 1.* (which act is required to be read at every quarter sessions, leet and law day, and once in every term in the open hall of every house of court and chancery), if any person shall by writing, printing, preaching or teaching, deed or act, advisedly and wittingly hold or stand with, to extol set forth maintain or defend the authority jurisdiction or power of the bishop of Rome or of his see, heretofore claimed used or usurped within this realm; or by any speech open deed or act, advisedly and wittingly attribute any such manner of jurisdiction authority or prebeminence to the said bishop or see of Rome within this realm: he, his abettors procurers and counsellors, and also their aiders assistants and comforters, upon purpose and to the intent to set forth further and extol the said usurped power, being thereof lawfully indicted or presented within one year, and convicted or attainted at any time after, shall incur a *præmunire*: And as well justices of assize in their circuits, as justices of the peace in their quarter or open sessions, may inquire thereof as of other offences against the peace, and shall certify every presentment thereof into the king's bench, within forty days, if the term be then open; if not, at the first day of the full term next following the said forty days; on pain of 100*l.* and the justices of the king's bench shall hear and determine the same, as in other cases of *præmunire*. And for the second offence, such person shall be guilty of high treason: But not to work corruption of blood, disherison of heirs, or forfeiture of dower. Provided; that the charitable giving of reasonable alms to any offender, without fraud or covin, shall not be deemed any such abetment procuring counselling aiding assisting or comforting, as thereby to incur any pain or forfeiture.

His abettors procurers and counsellors, and also their aiders assistants and comforters] An indictment against any such person must be, *knowing* the principal to be a maintainer of the jurisdiction of the pope; and to say, *against the form of the statute* only, is not sufficient. 1 H. H. 332.

Charitable giving of reasonable alms] This special clause of giving alms not to make an aider or comforter, if the alms be reasonable and without covin, tho' the offender be not imprisoned nor under bail, seems to be but agreeable to the common law; and therefore it seems even by the common law, if a physician or surgeon minister help to an offender sick or wounded, tho' he know him to be an offender even in treason, this makes him not a traytor, for it is done upon the account of common humanity; but it will be misprision of treason, if he know it, and do not discover him. 1 H. H. 332.

7. Finally, by the 3 J. c. 4. *If any person shall, either upon the seas, or beyond the seas, or in any other place within the king's dominions, put in practice to absolve persuade or withdraw any of his majesty's subjects from their natural obedience, or to reconcile them to the pope or see of Rome, or to any other prince state or potentate; or shall be willingly so absolved or withdrawn as aforesaid, or willingly reconciled, or shall promise obedience to any such pretended authority prince state or potentate; he, his procurers and counsellors, aiders and maintainers, knowing the same, shall be guilty of high treason.* f. 22, 23.

*But this shall not extend to any person who shall be reconciled to the pope or see of Rome (for and touching the point of so being reconciled only) that shall return into this realm, and thereupon within six days before the bishop of the diocese or two justices of the peace of the county where he shall arrive, submit himself and take the oaths (of allegiance and supremacy, 1 W. sess. 1. c. 8.): which oaths the said bishop or justices shall certify at the next session, on pain of 40*l.** f. 24.

And persons shall be tried for these offences, at the assizes of that county, or in the king's bench, and be there proceeded against as if the treason had been committed in the county where the person shall be taken. f. 25.

III. Peter-pence abolished.

Peter-pence was an annual tribute of one penny, paid at Rome out of every family at the feast of St. Peter. *Gibb.* 87.

And this, Ina the Saxon king, when he went in pilgrimage to Rome about the year 740, gave to the pope, partly as alms, and partly in recompence of a house erected in Rome for English pilgrims. *God.* 111, 356.

And this continued to be paid generally until the time of king Henry the eighth, when it was enacted, that from thenceforth *no person shall pay any pensions, censures, portions, peter-pence, or any other impositions, to the use of the bishop or see of Rome.* 25 H. 8. c. 21.

IV. First

IV. *First fruits and tenths taken from the pope.*

First fruits, annates, or primitiæ, are the first fruits after the avoidance of every spiritual living for one whole year. These have been paid of very ancient time; for amongst the laws of king Ina, who began his reign in the year 712, there is an order for the payment thereof. But the pope did not obtain to have them appropriated to himself, until after the reign of king Edward the first. 4 *Inst.* 120. *God. Introd.* 49. *Degge P. 2. c. 15.*

Tenths, decimæ, are the tenth part of the yearly value of all ecclesiastical livings. This payment was exacted from the clergy by the pope in the reign of king Edward the first; and was sometimes granted by the pope to the kings of this realm, especially for the aid of the holy land: but afterwards these tenths became wholly appropriated to the see of Rome. 4 *Inst.* 120; 121.

But by the 26 H. 8. c. 3. The revenues of the *first fruits and tenths* are for ever annexed to the imperial crown of this realm.

V. *The pope's presentation to benefices.*

1. By the 25 Ed. 3. ft. 6. If any reservation, collation, or provision be made by the court of Rome, of any archbishoprick, bishoprick, dignity, or other benefice, in disturbance of the rightful donors; the king shall present for that time, if such donors shall not themselves exercise their right. And if persons lawfully presented shall be disturbed by such provisors; then the said provisors, their procurators, executors, and notaries shall be attached by their body, and brought in to answer, and if they be convicted, they shall abide in prison without bail, till they have made fine to the king and agree to the party grieved; and before they be delivered, they shall make full renunciation, and find surety that they shall not attempt such things in time to come. And if they cannot be found, the exigent shall go against them.

2. By the 38 Ed. 3. ft. 2. To cease the perils that shall happen, because of provisions of benefices; it is ordained, that all persons obtaining such provisions, shall be punished according to the aforesaid statute of the 25 Ed. 3. and they who cannot be attached, if they appear not in two months, shall be punished according to the statute of provisors of the 27 Ed. 3. c. 1. (hereafter following).

3. By the 12 R. 2. c. 15. No person shall pass or send out of the realm, without the king's licence, to provide for himself a benefice; on pain that such provisor shall be out of the king's protection, and the benefice to be void.

4. And by the 13 R. 2. ft. 2. c. 2. If any shall accept a benefice contrary to the statute of the 25 Ed. 3. ft. 6. he shall be banished out of the realm for ever, and his lands and goods forfeited to the king.

5. By the 3 R. 2. c. 3. No person shall take to ferm any benefice of an alien, without the king's licence; nor shall convey money out of the realm for such ferm: on pain of being punished as by the statute of provisors of the 27 Ed. 3.

6. And

6. And by the 7 R. 2. c. 12. If any alien shall purchase and occupy any benefice, without the king's licence; he shall be comprised within the statute of the 3 R. 2. c. 3. and moreover shall incur the forfeitures of the 25 Ed. 3. st. 5. c. 22. (that is, he shall be out of the king's protection.)

7. And finally, by the 16 R. 2. c. 5. which the famous statute called the statute of *præmunire*, If any shall purchase or pursue, in the court of Rome or elsewhere, any translation of any prelate out of the realm, or from one bishoprick to another, ——— he shall be put out of the king's protection, his lands and goods forfeit to the king, and shall be attached by his body if he may be found, and brought before the king and his council there to answer, or else process to be made against him by *præmunire facias*, as in other statutes of provisors.

Shall be put out of the king's protection] By these words, the persons attainted in a writ of *præmunire*, are disabled to have any action or remedy by the king's law or the king's writs; for the law and the king's writs are the things whereby a man is protected and aided; so as he who is out of the king's protection, is out of the aid and protection of the law. 3 Inst. 126.

VI. Appeals to Rome.

1. The statutes concerning the prohibition of appeals to Rome, are but declaratory of the ancient law of the realm. 4 Inst. 340, 341.

2. The first attempt of any appeal to the see of Rome out of England, was by Anselm archbishop of Canterbury, in the reign of William Rufus; and yet it took no effect. 4 Inst. 341.

And the same is opposed by the statutes following:

3. By the 27 Ed. 3. c. 1. called the statute of provisors, *All the people of the king's ligeance, which shall draw any out of the realm in plea, whereof the cognisance pertaineth to the king's court, or of things whereof judgments be given in the king's court, or which do sue in any other court, to defeat or impeach the judgments given in the king's court, shall have a day containing the space of two months by warning to be made to them, to appear before the king and his council, or in his chancery, or before the king's justices of the one bench or the other, to answer to the king for the contempt. And if they come not at the day to be at the law; they, their procurators attornies executors notaries and maintainers, shall be put out of the king's protection, and their lands and goods forfeit to the king, and their bodies (wheresoever they may be found) shall be taken and imprisoned and ransomed at the king's will: And upon the same a writ shall be made, to take them by their bodies, and to seize their lands and goods into the king's hands; and if it be returned that they be not found, they shall be put in exigent and outlawed.*

4. By the 38 Ed. 3. st. 2. To cease the perils that shall happen, because of citations out of the court of Rome, upon causes whose cognizance pertaineth to the king's court; it is ordained, that all persons obtaining such citations shall be punished according to the statute of the 25 Ed. 3. st. 6. (above recited),

cited); and they who cannot be attached, if they appear not in two months, shall be punished according to the aforesaid statute of provisors. And the king, clergy, and laity do mutually engage, to stand by one another in defence of this act.

5. By the 13 R. 2. ft. 2. c. 3. If any person shall bring or send into the realm any summons, sentences, or excommunications, against any person for executing the statute of provisors; he shall be imprisoned, and forfeit his lands and goods, and incur the pain of life and member: And if any prelate make execution thereof, his temporalities shall be taken into the king's hands; and if any person of less estate than a prelate make such execution, he shall be imprisoned, and make fine and ransom by the discretion of the king's council.

6. By the statute of præmunire, 16 R. 2. c. 5. If any shall purchase or pursue, in the court of Rome or elsewhere, any processes, sentences of excommunication, bulls or instruments, against any person executing judgments in the king's courts; or shall bring within the realm or receive the same: he shall be put out of the king's protection, his lands and goods forfeit to the king, and shall be attached by his body if he may be found, and brought before the king and his council there to answer, or else process to be made against him by præmunire facias, as in other statutes of provisors.

Or elsewhere] It hath been said, that suits in the ecclesiastical courts within this realm are within these words, if they concern matters the cognizance whereof belongs to the common law; as where a bishop deprives an incumbent of a donative, or excommunicates a man for hunting in his parks. 1 Haw. 51.

But it seemeth that a suit in those courts, for a matter which appears not by the libel it self, but only by the defendant's plea or other matter subsequent, to be of temporal cognizance (as where a plaintiff libels for tithes, and the defendant pleads that they were severed from the nine parts, by which they became a lay fee), is not within the statute; because it appears not that either the plaintiff or the judge knew that they were severed. 1 Haw. 52.

7. Finally, by the 24 H. 8. c. 12. All causes testamentary, causes of matrimony, and divorces, rights of tithes, oblations, and obventions (the knowledge whereof by the goodness of princes of this realm, and by the laws and customs of the same, appertaineth to the spiritual jurisdiction of this realm) shall be determined within the king's jurisdiction and authority, and not elsewhere; any foreign inhibitions, appeals, sentences, summons, citations, suspensions, interdictions, excommunications, restraints, judgments, or other process or impediments whatsoever notwithstanding. And all spiritual persons shall and may use, minister, and execute all divine services, any foreign citations, processes, inhibitions, suspensions, interdictions, excommunications, or appeals touching any the causes aforesaid, from or to the see of Rome, or any other foreign prince or court, to the contrary notwithstanding: And if they shall, by the occasion thereof, refuse to minister the same, they shall be imprisoned for a year, and make fine and ransom at the king's pleasure.

And if any person in any the causes aforesaid, shall attempt or procure from the see of Rome or elsewhere, any foreign process or other the instruments abovementioned, or execute any of the same, or do any thing to the hindrance of any process sentence judgment or determination in any courts of this realm, for any the causes aforesaid; he, his fautors comforters abettors procurers executors and counsellors, shall incur a præmunire.

VII. Bringing bulls and other instruments from Rome.

1. By the 25 H. 8. c. 21. If any person shall sue to the court or see of Rome for any licence, faculty, or dispensation, or put any of the same in execution; he shall incur a præmunire.

2. And by the 28 H. 8. c. 16. All bulls, breves, faculties, and dispensations heretofore obtained of the see of Rome, shall be void; and shall not be pleaded in any court of this realm, on pain of a præmunire.

Yet it hath been holden, that the alledging of an ancient bull, in order to induce another principal matter, whereon to ground a title, without claiming any thing from the bull it self, is not within this statute. 1 Haw. 51.

3. By the 13 Eliz. c. 2. If any person shall use or put in ure any bull writing or instrument written or printed, of absolution or reconciliation obtained from the bishop of Rome or other person claiming authority by or from him; or shall take upon him by colour thereof to absolve or reconcile any person, or to grant or promise to any person any such absolution or reconciliation, by any speech, preaching, teaching, writing, or any other open deed; or shall willingly receive and take any such absolution or reconciliation; or shall obtain from the bishop of Rome any manner of bull, writing, or instrument, written or printed, containing any thing matter or cause whatsoever; or shall publish or by any means put in ure any such bull, writing, or instrument; he, his procurers abettors and counsellors to the fact and committing of the said offence, being attainted according to the course of the laws of this realm, shall be adjudged guilty of high treason. And all aiders comforters or maintainers of any the said offenders, after committing any the said offences, to the intent to set forth uphold or allow the execution of the said usurped power, shall incur a præmunire.

And if any person to whom any such absolution, reconciliation, bull, writing or instrument shall be offered moved or persuaded to be used put in ure or executed, shall conceal the same offer motion or persuasion, and not disclose the same by writing or otherwise within six weeks to some of the privy council; he shall be guilty of misprision of high treason.

(And the justices of the peace may inquire thereof (but not hear and determine the same) within a year and a day after the offence committed. 23 El. c. 1. f. 8.)

And if any justice of the peace to whom any the said offences shall be declared, do not within fourteen days signify the same to one of the privy council; he shall incur a præmunire.

VIII. Popish books and relicks.

1. By the 3 & 4 Ed. 6. c. 10. All books called antiphoners, missals, grailes, processionals, manuals, legends, pies, portuasses, primers in latin and english, couchers, journals, ordinals, or other books or writings heretofore used for the service of the church, written or printed in the english or latin tongue, other than such as shall be set forth by the king's majesty, shall be clearly and utterly abolished, extinguished, and forbidden for ever to be used or kept in this realm.

And if any person or body corporate that shall have in his or their custody any the said books or writings, or any images of stone, timber, alabaster, or earth, graven carved or painted, which have been taken out of or stand in any church or chapel, and do not destroy the same images and every of them, and deliver every of the same books to the mayor, bailiff, constable, or churchwardens of the town where such books shall be, to be by them delivered over openly within three months next following after such delivery, to the archbishop, bishop, chancellor, or commissary of the diocese, to the intent that they may cause them immediately after either to be openly burnt, or otherwise defaced and destroyed; (he) shall for every such book or books willingly retained forfeit to the king for the first offence twenty shillings, for the second four pounds, and for the third shall suffer imprisonment at the king's will.

And if any mayors, bailiffs, constables, or churchwardens, do not within three months after receipt of the same books deliver them to the archbishop, bishop, chancellor, or commissary; and if such archbishop, bishop, chancellor, or commissary do not, within forty days after receipt of such books, burn, deface and destroy the same; every of them so offending shall forfeit to the king 40l. The one half of all which forfeitures shall be to any of the subjects that will sue for the same.

And the justices of assize in their circuits, and justices of the peace in the general sessions, may inquire of, hear, and determine the same.

But nothing herein shall extend to any image or picture, set or graven upon any tomb, in any church, chapel, or church yard, only for a monument of any king, prince, nobleman, or other dead person, which hath not been commonly reputed and taken for a saint.

Also, any person may use keep and have any primers in the english or latin tongue, set forth by king Hen. 8. so that the sentences of invocation or prayer to saints be blotted or put out of the same.

2. By the 13 Eliz. c. 2. If any person shall bring into the realm any token or thing called by the name of agnus dei, or any crosses pictures beads or such like vain and superstitious things from the bishop or see of Rome, or from any person authorized or claiming authority from the said bishop of Rome to consecrate or hallow the same; and shall deliver or cause or offer to be delivered the same or any of them to any subject of this realm, to be worn or used: he, and also every other person who shall receive the same to the intent to use and wear the same, shall incur a præmunire.

Popery.

Provided, that if any person to whom any such agnus dei or other the things aforesaid shall be offered to be delivered, shall apprehend the party offering the same, and bring him to the next justice of the peace, if he shall be able so to do; or for lack of such ability, shall within three days disclose the name of such person so offering the same and his dwelling place or place of resort (which he shall endeavour himself to know by all the means he can) to the ordinary of the diocese or to a justice of the peace of the shire where such person to whom such offer shall be made shall be resident; and also if such person to whom such offer shall be made shall happen to receive any such agnus dei or other thing above remembred, and shall in one day next after such receipt deliver the same to a justice of the peace: in such case he shall not incur any danger or penalty.

And if any justice of the peace, to whom any the said offences shall be declared, do not within fourteen days signify the same to one of the privy council, he shall incur a præmunire.

3. By the 3 J. c. 5. No person shall bring from beyond the seas, nor shall print sell or buy any popish primers, ladies psalters, manuals, rosaries, popish catechisms, missals, breviaries, portals, legends, and lives of saints, containing superstitious matter, printed or written in any language whatsoever, nor any other superstitious books printed or written in the english tongue; on pain of 40s. for every book, one third to the king, one third to him that shall sue, and one third to the poor of the parish where such books shall be found and the said books to be burned. s. 25.

And two justices of the peace (and mayors within cities and towns corporate) may search the houses and lodgings of every popish recusant convict, or of every person whose wife is a popish recusant convict, for popish books and relicks of popery; and if any alter, pix, beads, pictures, or such like popish relicks, or any popish book or books, shall be found in any of their custody, as in the opinion of the said justices (or mayor) shall be thought unmeet for such recusant to have or use, the same shall presently be defaced and burnt, if it be meet to be burned; and if it be a crucifix, or other relick of any price, the same to be defaced at the general quarter sessions of the peace in the county where the same shall be found, and the same so defaced to be restored to the owner. s. 26.

Note; a *recusant*, in general, signifieth any person, whether papist or other, who refuseth to go to church and to worship god after the manner of the church of England; a *popish recusant*, is a papist who so refuseth; and a *popish recusant convict*, is papist legally convicted of such offence.

IX. Jesuits and popish priests.

1. By the 27 El. c. 2. All jesuits, seminary priests, and other priests whatsoever made or ordained out of the realm, or within the realm, by any authority derived or pretended from the see of Rome, shall depart out of the realm. s. 2.

And it shall not be lawful for any jesuit, seminary priest, or other such priest, deacon, or religious or ecclesiastical person whatsoever, being born within the realm, and made ordained or professed by any authority derived or pretended from the see of Rome, by what name title or degree soever the same shall be called or known, to come into be or remain in any part of the realm; and if he do, he shall be guilty of high treason. §. 3.

And every person who shall wittingly and willingly receive relieve comfort aid or maintain any such jesuit seminary priest or other priest deacon or religious or ecclesiastical person as aforesaid, shall be guilty of felony without benefit of clergy. §. 4.

And if any subject (not being a jesuit seminary priest or other such priest deacon or religious or ecclesiastical person as is before mentioned) who shall be of or brought up in any college of jesuits or seminary out of this realm in any foreign parts, shall not in six months next after proclamation in that behalf to be made in the city of London under the great seal of England, return into this realm, and thereupon (within two days next after such return) before the bishop of the diocese or two justices of the peace of the county where he shall arrive, submit himself and take the oath of supremacy; every such person who shall otherwise return into or be in this realm without submission as aforesaid, shall be guilty of high treason. §. 5.

And if any person shall wittingly and willingly either directly or indirectly convey deliver or send, or procure to be conveyed or delivered to be sent out of this realm into any foreign parts; or shall otherwise wittingly or willingly give or contribute any money or other relief to or for any jesuit seminary priest or such other priest deacon or religious or ecclesiastical person as is aforesaid, or to or for the maintenance or relief of any college of jesuits or seminary out of the realm in any foreign parts, or of any person then being of or in the same colleges or seminaries and not returned with submission as in this act is expressed; he shall incur a præmunire. §. 6.

And every offence against this act may be inquired of heard and determined as well in the court of king's bench in the county where the same court shall for the time be, as also in any other county within this realm where the offence shall be committed, or where the offender shall be taken. §. 8.

But nothing herein shall extend to any such jesuit seminary priest or other such priest deacon or religious or ecclesiastical person as is before mentioned, as shall within three days after he come into the realm, submit himself to some archbishop or bishop of this realm or to some justice of the peace within the county where he shall arrive or land, and do thereupon truly and sincerely before such archbishop bishop or justice of the peace take the oath of supremacy, and by writing under his hand confess and acknowledge, and from thenceforth continue his due obedience to the laws and statutes of this realm in causes of religion. §. 10.

And every person who shall know and understand that any such jesuit seminary priest or other priest aforesaid shall be within this realm, and shall not discover the same to a justice of the peace or other higher officer in twelve days, but willingly conceal his knowledge therein, shall be fined and imprisoned at the king's pleasure. And if such justice of the peace or other such officer to whom

such matter shall be so discovered, do not within twenty eight days give information thereof to some of the privy council; he shall forfeit 200 marks. §. 13.

And such of the privy council to whom such information shall be made, shall thereupon deliver a note in writing, subscribed with his hand, testifying that such information was made to him. §. 14.

And all such oaths and submissions as shall be made by force of this act, shall be certified into the chancery by the parties before whom the same shall be made, within three months after such submission; on pain of 100*l.* to the queen. §. 15.

And if any person so submitting himself shall within ten years after such submission made come within ten miles of the place where the queen shall be, without especial licence under her majesty's hand; he shall take no benefit by his submission, but the same shall be void. §. 16.

2. By the 35 El. c. 2. If any person who shall be suspected to be a jesuit, seminary, or massing priest, being examined by any person having lawful authority in that behalf to examine him, shall refuse to answer directly and truly whether he be a jesuit, or a seminary or massing priest; he shall be committed to prison by such as shall so examine him, and there continue until he shall make direct and true answer to the said questions whereupon he shall be so examined. §. 11.

3. And by the 3 J. c. 5. Such person as shall first discover to any justice of the peace any recusant or other person who shall entertain or relieve any jesuit, seminary, or popish priest, or shall discover any mass to have been said and the priest that said the same, within three days after the offence committed, and by reason of such discovery any of the said offenders shall be taken and convicted or attainted,——shall not only be freed from the danger and penalty of any law for such offences if he be an offender therein, but also shall have the third part of the forfeiture so as the total exceed not 150*l.*; and if it do exceed 150*l.*, he shall have the sum of 50*l.* for every such discovery: and after conviction of the offender, he shall have a certificate from the judges or justices of the peace before whom the conviction shall happen, to be directed to the sheriff or other officer who shall seize the goods or levy the forfeiture, commanding him to pay the same out of the monies to be levied by virtue of the said forfeitures. §. 1.

4. And by the 11 & 12 W. c. 4. Every person who shall apprehend a popish bishop priest or jesuit, and prosecute him till he be convicted of saying mass, or of exercising any other part of the office or function of a popish bishop or priest within this realm,——shall have from the sheriff without fee one hundred pounds within four months after the conviction, and demand thereof made by tendering a certificate to the said sheriff under the hand of the judge or justices before whom the conviction shall be, certifying such conviction and that such popish priest or jesuit was taken by the person claiming the reward: And if any dispute shall arise between the persons apprehending, the said judge or justices shall by their certificate proportion the shares as to them shall seem just and reasonable. And if the sheriff shall die or be removed before the expiration of the said four months, his successor shall pay the same within two months after demand and certificate brought as aforesaid. The sheriff making default shall forfeit 200*l.* to the person to whom the money is due, with full costs. The sheriff to be repaid the money contained in such certificate out of the treasury. §. 1, 2.

And if any popish bishop priest or jesuit shall say mass, or exercise any other part of the office or function of a popish bishop or priest within this realm; he shall be adjudged to perpetual imprisonment in such place within this realm, as the king by advice of the privy council shall appoint. s. 3.

But this shall not extend to any popish priest for saying mass or officiating as a priest in the house of a foreign minister; so as such priest be not a natural born subject, nor naturalized; and so as his name and place of his birth, and the minister to whom he shall belong, be entred in the office of the principal secretary of state. s. 5.

X. Saying or hearing mass.

1. By the 23 El. c. 1. Every person who shall say or sing mass, shall forfeit 200 marks, and be committed to the next gaol for one year and further till he have paid the said sum. And every person who shall willingly hear mass, shall forfeit 100 marks, and be imprisoned for a year. s. 4.

Which said forfeitures, by another clause in the said act, shall be one third to the king to his own use; one third to the king for relief of the poor in the parish where the offence shall be committed, to be delivered by warrant to the principal officers in the receipt of the exchequer, without further warrant from the king; and one third to him who shall sue. And if such person shall not be able, or shall fail to pay the same within three months after judgment given; he shall be committed to prison till he have paid the same, or conform himself to go to church. s. 11.

And the justices of assize, and justices of the peace in their open quarter sessions, may inquire of, hear, and determine the same. s. 9.

But if the offender shall, before he be indicted, or at his arraignment or trial before judgment, submit and conform himself before the bishop of the diocese, or before the justices where he shall be indicted arraigned or tried (not having before made like submission at his trial being indicted for the first offence); he shall be discharged, upon his recognition of such submission in open assizes or sessions of the county where he shall be resident. s. 10.

2. And by the 3 J. c. 5. Such person as shall first discover to any justice of the peace any mass to have been said, and the persons that were present at such mass, or any of them, within three days next after the offence committed, and by reason of such discovery any of the said offenders shall be taken and convicted or attainted,—shall not only be freed from the danger and penalty of any law for such offences if he be an offender, but also shall have the third part of the forfeiture, so as the total exceed not 150l; and if it do exceed 150l, he shall have the sum of 50l for every such discovery: and after conviction of the offender, he shall have a certificate from the judges or justices of the peace before whom the conviction shall happen, to be directed to the sheriff or other officer who shall seize the goods or levy the forfeiture, commanding him to pay the same out of the monies to be levied by virtue of the said forfeitures. s. 1.

XI. *Frequenting conventicles.*

By the 1 W. c. 18. commonly called the act of toleration, Every justice of the peace may require any person that goes to any meeting for the exercise of religion, to make and subscribe the declaration of the 30 C. 2. against popery, and also to take the oaths of allegiance and supremacy (or the declaration of fidelity in case he scruples to take an oath); and upon refusal thereof, shall commit him to prison without bail, and shall certify the name of such person to the next sessions; and if he shall upon a second tender at the sessions refuse to make and subscribe the declaration aforesaid, he shall be then and there recorded, and shall be taken thenceforth for a popish recusant convict and suffer accordingly.

And there is a clause in the said act, that nothing in that act contained shall give any ease benefit or advantage, to any papist or popish recusant whatsoever.

XII. *Foreign education of papists.*

1. By the 1 J. c. 4. Every person who shall pass or go, or shall send any child or any other person under his government, into any the parts beyond the seas, out of the king's obedience, to the intent to enter into or be resident in any college seminary or house of jesuits priests or any other popish order profession or calling, or repair to any the same, to be instructed persuaded or strengthened in the popish religion, or in any sort to profess the same; every such person so sending any child or other person beyond the seas to any such purpose, shall forfeit to the king 100*l*; and every such person so passing or being sent, shall in respect of himself only and not of his heirs or posterity, be disabled to inherit purchase take have or enjoy any lands profits goods debts duties legacies or sums of money within this realm, and all estates and interests in trust for him shall be void. §. 6.

But if such person or child so passing or sent shall after become conformable and obedient to the laws of the church, and shall repair to church, and continue in such conformity; he shall during such time as he shall so continue, be discharged of every such disability and incapacity. §. 7.

And by the same act, No woman, nor any child under the age of twenty one years (except sailors or ship boys, or the apprentice or factor of a merchant) shall be permitted to pass over the seas (except by licence of the king, or of six or more of the privy council under their hands); on pain that the officer of the port that shall willingly or negligently suffer any such to pass, or shall not enter the names of such passengers licensed, shall forfeit his office and his goods; and on pain that the owner of the ship that shall wittingly or willingly carry any such over sea without such licence, shall forfeit his ship and tackle; and every master or mariner of or in any vessel offending aforesaid, shall forfeit his goods, and be imprisoned for twelve months. §. 8.

The one half of all which forfeitures shall be to the king, and the other to him that will sue. §. 9.

And

2. And by the 3 J. c. 5. If the children of any subject within this realm (the said children not being soldiers mariners merchants or their apprentices or factors) to prevent their good education in England, or for any other cause, shall be sent or go beyond seas, without licence of the king, or of six of the privy council (whereof the principal secretary to be one) under their hands and seals; every such child shall take no benefit by any gift conveyance descent devise or otherwise of any lands leases or goods, until he being of the age of eighteen years take the oaths of allegiance and supremacy before a justice of the peace where the parent shall inhabit; and in the mean time the next of kin, who shall be no popish recusant, shall enjoy the same until he shall conform himself and take the said oaths and receive the sacrament: And after such oaths taken and conforming and receiving the sacrament, he who received the profits shall make account thereof, and in reasonable time make payment thereof, and restore the value of such goods. f. 16.

And all such persons as shall so send such child or children over seas, shall forfeit 100l (to him who shall discover and convict the offender. 11 & 12 W. c. 4. f. 6.) f. 16.

3. And by the 3 C. c. 2. If any person shall pass or go, or shall convey or send, or cause to be sent or conveyed any child or other person into any parts beyond the seas out of the king's obedience, to the intent and purpose to enter into or be resident or trained up in any priory, abbey, nunnery, popish university, college or school, or house of jesuits, priests, or in any private popish family, and shall be there by any jesuit, seminary priest, frier, monk, or other popish person instructed persuaded or strengthened in the popish religion, in any sort to profess the same; or shall convey or send, or cause to be conveyed or sent any sum of money or other thing, for the maintenance of any child or other person gone or sent and trained and instructed as is aforesaid, or under colour of any charity benevolence or alms towards the relief of any priory abbey or nunnery college school or any religious house: every person so sending conveying or causing to be sent and conveyed as well any such child or other person, as any sum of money or other thing, and every person being sent beyond the seas, shall be disabled to sue or use any action bill plaint or information in course of law, or to prosecute any suit in any court of equity, or to be committee of any ward, or executor or administrator to any person, or capable of any legacy or deed of gift, or to bear any office; and shall forfeit his goods, and shall forfeit his lands during life. f. 1.

The said offences to be inquired of heard and determined in the king's bench, or at the assizes of such counties where the offenders did last dwell or abide, or whence they departed out of the realm, or where they were taken. f. 3.

Provided, that no person so sent or conveyed, that shall within six months after his return conform himself to the established religion and receive the sacrament according to the statutes made concerning conformity from popish recusants, shall incur any the said penalties. f. 2.

And if at any time after the said six months he shall so conform himself, he shall have his lands restored, during the time that he shall so continue in such conformity. f. 4.

XIII. Popish children of protestants.

If any person not bred up by his parents from his infancy in the popish religion, and professing himself to be a popish recusant, shall breed up instruct or educate his child or children, or suffer them to be instructed or educated in the popish religion; he shall be disabled of bearing any office or place of trust or profit in church or state: And all such children as shall be so brought up instructed or educated, shall be disabled of bearing any such office or place of trust or profit, until they be perfectly reconciled and converted to the church of England, and shall take the oaths of allegiance and supremacy before the justices of the peace at the quarter sessions of the place where they shall inhabit, and thereupon receive the sacrament of the lord's supper, and obtain a certificate thereof, under the hands of two of the said justices. 25 C. 2. c. 2. s. 8.

XIV. Protestant children of papists.

If any popish parent, in order to compel his protestant child to change his religion, shall refuse to allow him a fitting maintenance, suitable to the degree and ability of such parent, and to the age and education of such child; then upon complaint thereof to the lord chancellor, he shall make order therein. 11 & 12 W. c. 4. s. 7.

XV. Papists not repairing to church.

1. By the 1 El. c. 2. All persons shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour themselves to resort to their parish church or chapel accustomed, or upon reasonable let thereof to some usual place where common prayer and such service of god shall be used in such time of let, upon every sunday and other days ordained and used to be kept as holidays, and then and there to abide orderly and soberly during the time of common prayer preaching or other service of god there to be used and ministered; on pain of punishment by the censures of the church, and also upon pain that every person so offending shall forfeit for every such offence 12d, to be levied by the churchwardens of the parish where such offence shall be done, to the use of the poor of the same parish, of the goods lands and tenements of such offender, by way of distress. s. 14.

And all archbishops bishops and all other their officers exercising ecclesiastical jurisdiction, as well in places exempt as not exempt, within their diocese, shall have power to reform correct and punish by censures of the church, all offenders within any their jurisdiction or diocese. s. 16.

And the justices of assize may inquire of hear and determine the same. s. 17.

And the archbishop or bishop may at his liberty and pleasure associate himself to the justices of assize, for the inquiring of hearing and determining the same. s. 18.

But no person shall be molested for the said offence unless he be thereof indicted at the next assize. s. 20.

And the mayor of London and all other mayors bailiffs and other head officers of cities boroughs and towns corporate to which the justices of assize do not commonly repair, shall have power to inquire of hear and determine the same yearly within fifteen days after Easter and Michaelmas, in like manner as the justices of assize may do. f. 22.

And all archbishops and bishops, and every of their chancellors, commissaries, archdeacons, and other ordinaries, having any peculiar ecclesiastical jurisdiction, shall have power as well to inquire in their visitation synods and elsewhere within their jurisdiction, at any other time and place, to take accusations and informations of the said offences committed within the limits of their jurisdiction, and to punish the same by admonition excommunication sequestration or deprivation and other censures and process in like form as heretofore hath been used in like cases by the king's ecclesiastical laws. f. 23.

Provided, that whatsoever persons offending in the premises shall for their offences first receive punishment of the ordinary, having a testimonial thereof under the ordinary's seal, shall not for the same offence afterwards be convicted before the justices; and likewise receiving for the said offence punishment first by the justices, shall not for the same offence afterwards receive punishment of the ordinary. f. 24.

All persons] Except dissenters qualified by the act of toleration, who resort to some congregation of religious worship allowed by that act. 1 W. c. 18. s. 2, 16.

Having no lawful or reasonable excuse] It hath been holden. that the indictment need not to shew that the party had no reasonable excuse for his absence; but the defendant, if he have any matter of this kind in his favour, ought to shew it. 1 Haw. 13.

And if the spiritual court, proceeding upon this statute, refuse to allow a reasonable excuse, they may be prohibited; but if they proceed wholly on their own canons, they shall not be at all controlled by the common law, unless they act in derogation from it, as by questioning a matter not triable by them, as the bounds of a parish, or the like; for they shall be presumed to be the best judges of their own laws. 1 Haw. 13.

To some other usual place] And he who is absent from his own parish church shall be put to prove where he went to church. 1 Haw. 13.

To abide orderly and soberly during the time] He who misbehaves himself in the church, or misses either morning or evening prayer, or goes away before the whole service is over, is as much within the statute as he who is wholly absent. 1 Haw. 13.

Thereof be indicted] The offence in not coming to church consisting wholly in a non-feasance, and not supposing any fact done, but barely the omission of what ought to be done, needs not be alledged in any certain place; for properly speaking, it is not committed any where. 1 Haw. 13.

And by the 3 J. c. 4. The justices of assize and justices of the peace in sessions shall have power to inquire hear and determine of all recusants and offences for not repairing to church according to the meaning of former laws, as the justices of assize may do by such former laws; and also shall have power at their assizes, and at the sessions (in which any indictment against any person for not repairing to church according to such former laws shall be taken) to make proclamation, by which it shall be commanded that the body of such offender be rendred to the sheriff or other keeper of the gaol, before the next assizes or before the next sessions respectively; and if at the said next assizes or sessions the offender so proclaimed shall not make appearance of record, then upon every such default recorded, the same shall be as sufficient conviction in law, as if upon the indictment a verdict had been found and recorded. s. 7.

And by the same statute of 3 J. c. 4. If any person shall not resort every sunday to some church chapel or usual place of common prayer, and there hear divine service, according to the 1 El. c. 2. one justice of the peace of that division where the party shall dwell, on proof to him made of such default by confession or oath of witness, may call the said party before him; and if he shall not make a sufficient excuse and due proof thereof to the satisfaction of the said justice, he may give warrant to the churchwarden of the said parish wherein the said party shall dwell, to levy 12 d. for every such default by distress and sale; and in default of such distress, the said justice may commit him to some prison within the shire division or liberty wherein such offender shall be inhabiting, till payment be made; which said forfeiture shall be to and for the use of the poor of that parish wherein the offender shall be abiding at the time of the offence committed. s. 27.

But no man shall be impeached upon this clause, except he be called in question for his default within one month after the said default made. s. 28.

And no man being punished according to this branch, shall for the same offence be punished by the 1 El. c. 2. id. s. 29.

2. By the 23 El. c. 1. Every person above the age of sixteen years, who shall not repair to some church chapel or usual place of common prayer, but forbear the same contrary to the 1 El. c. 2. shall forfeit to the queen's majesty for every month which he shall so forbear 20l; and over and besides the said forfeitures, every person so forbearing by the space of twelve months shall, after certificate thereof in writing made into the king's bench by the bishop of the diocese or a justice of assize or a justice of the peace of the county where the offender shall dwell, be bound with two sufficient sureties in 200l at least, to the good behaviour, and so to continue bound until he conform himself and come to church. Which said forfeitures shall be one third to the king to his own use; one third to the king for relief of the poor in the parish where the offence shall be committed, to be delivered by warrant to the principal officers in the receipt of the exchequer without further warrant from the king; and one third to him who shall sue. And if such person shall not be able, or shall fail to pay the same within three months after judgment given; he shall be committed to prison till he have paid the same, or conform himself to go to church. s. 5, 11.

But if the offender shall before he be indicted, or at his arraignment or trial before judgment, submit and conform himself before the bishop of the diocese or before the justices where he shall be indicted arraignment or tried (having not before made like submission at his trial being indicted for the first offence); he shall be discharged, upon his recognition of such submission in open assizes or sessions of the county where he shall be resident. s. 10.

Also every person which usually on the sunday shall have in his house divine service by law established, and be thereat himself most commonly present and shall not obstinately refuse to come to church, and shall also four times a year at least be present at the divine service in the church of the parish where he shall be resident, or in some other common church or chapel of ease, shall not incur any pain or penalty for not repairing to church. s. 12.

And every grant conveyance bond judgment and execution, made of covinous purpose to defraud any interest right or title that may or ought to grow to the king or to any other person by any conviction or judgment on this statute, shall be void against the king, and against such as shall sue for such penalty as aforesaid. s. 13.

But forbear the same contrary to the 1 El. c. 2.] A person who was sick for part of the time contained in an information upon this statute, shall not be at all excused by reason of such sickness, if it be proved that he was a recusant both before and after; for it shall be intended that he obstinately forbore during that time. 1 Haw. 14.

Shall forfeit to the queen's majesty for every month] It hath been resolved, that this statute by inflicting 20l for a month's absence, dispenseth not with the forfeiture of 12d for the absence of one sunday; for both may well stand together; and the 12d is immediately forfeited upon the absence of each particular day. 1 Haw. 13.

For every month] The time of a month intended by this statute, shall be computed not by the kalendar, but by the number of days, allowing twenty eight days to each, according to the common rule of expounding statutes, which speak generally of a month. 1 Haw. 14.

One third to, &c.] This clause for distribution of the forfeitures is nevertheless consistent with the former part, in giving the whole forfeiture to the queen; it being usual in acts of parliament, to give the whole penalty for any criminal matter to the king, and afterwards in the same act to make distribution thereof, and to give part to him that will sue. 1 Haw. 18.

And by the 29 El. c. 6. it is further enacted, that every seoffment gift grant conveyance alienation estate lease incumbrance and limitation of use, of or out of any lands, made by any person which hath not repaired or shall not repair to some church chapel or usual place of common prayer, contrary to the 23 El. c. 1. and which is revocable at the pleasure of such offender, or in any wise directly or indirectly intended for the behoof relief or maintenance or at the disposition of such offender, or whereby such offender or his family shall

be maintained, — shall be utterly void as against the king for levying the penalties. §. 1.

But this shall not extend to make void or impeach any grant or lease made bona fide, without fraud or covin, whereupon the accustomed yearly rent or more shall be reserved, or any other conveyance made bona fide upon good consideration, and without fraud or covin, which shall not be revocable at the pleasure of the offender, otherwise than to give benefit to the king to enjoy such rents and payments during the continuance of such lease and grant. §. 8.

And every conviction for such offence shall be in the king's bench or at the assizes, and not elsewhere; and shall from the justices before whom the record of such conviction shall remain, be estreated into the exchequer before the end of the term next ensuing such conviction. §. 2.

And every such offender in not repairing to church as shall be thereof once convicted, shall in such of the terms of Easter or Michaelmas as shall be next after such conviction, pay into the exchequer after the rate of 20l for every month which shall be contained in the indictment whereupon the conviction shall be; and shall also for every month after such conviction without any other indictment or conviction pay into the exchequer at two times a year, viz. in every Easter and Michaelmas term as much as shall then remain unpaid, after the rate of 20l for every month after such conviction. And if default shall be made in any part of any payment aforesaid, the queen may by process out of the exchequer seize all the goods and two parts of the lands liable to such seizure or to the penalties aforesaid, leaving the third part only of such lands for the maintenance of the offender and his family. §. 4.

And for the more speedy conviction of such offender in not repairing to divine service, the indictment mentioning the not coming of such offender to the church of the parish where he at any time before such indictment was or did keep house or residence, nor to any other church chapel or usual place of common prayer, shall be sufficient in the law; and it shall not be needful to mention in the indictment that the offender was or is inhabiting within this realm; but if it shall happen any such offender then not to be within this realm, the party shall be relieved by plea to be put in and not otherwise: And upon the indictment of such offender, a proclamation shall be made at the assizes in which the indictment shall be taken (if the same be taken at any assize) by which it shall be commanded, that the body of such offender shall be rendred to the sheriff before the next assizes; and if at the said next assizes the offender so proclaimed shall not appear of record, then upon such default recorded, the same shall be as sufficient a conviction in law of the said offence as if a trial had been by verdict. §. 5.

Provided, that when such offender shall make submission and conform, or shall die; no forfeiture of 20l for any month or seizure of the lands of the offender, from such submission and conformity or death, and satisfaction of all the arrearages of 20l monthly, before such seizure due or payable, shall ensue or be continued against such offender. §. 6.

And the lord treasurer, chancellor, and chief baron of the exchequer, or two of them, may assign such third part given to the poor by the former act,

as well for relief of the poor, and of the houses of correction, as of impotent and maimed soldiers; as they or any two of them shall appoint. s. 7.

And this act shall not extend to continue any seizure of any lands of such offender in the queen's hands, after the offender's death, which lands he shall have only for term of his life, or in the right of his wife. s. 9.

May seize all the goods] The king, according to the better opinion, may seize the goods, but not grant them over, without an inquisition to be taken. 1 Haw. 20.

And two parts of the lands] But the king cannot seize the lands till it appears by the return of an inquisition to that purpose to be awarded, of what lands the offender was seized; because the king's title to lands ought always to appear of record. 1 Haw. 20.

Shall not appear of record] If a recusant who was proclaimed at the assizes, render himself at the next assizes to plead or traverse; he must appear in person, and he is to be in custody: for the words of the statute and of the proclamation are, that he shall render his body to the sheriff. Kelyng 35.

Of record] An actual personal appearance of the defendant will no way avail him, unless the same be entred of record. 1 Haw. 16.

And by the 1 J. c. 4. Where any seizure shall be had of the two parts of the lands for the not payment of 20l a month; such two parts shall, according to the extent thereof, go towards the payment of such 20l a month being unpaid by any such recusant: and the third part thereof shall not be extended or seized by the king for not payment of the said 20l a month. And where any seizure shall be had of the two parts as aforesaid, and such recusant shall die, the debt or duty by reason of his recusancy not being discharged; in such case the same two parts shall continue in his majesty's possession until the residue of the said debt or duty shall be discharged: and the king shall not seize or extend any third part descending to any such heirs, either by reason of the recusancy of his ancestors, or the recusancy of any such heirs. s. 5.

And moreover, by the 3 J. c. 4. it is further enacted, that every offender in not repairing to divine service, being once convicted, shall in such of the terms of Easter and Michaelmas as shall be next after such conviction, pay into the receipt of the exchequer after the rate of 20l for every month which shall be contained in the indictment whereupon such conviction shall be; and shall also for every month after such conviction, without any other indictment or conviction, forfeit 20l, and pay into the receipt of the exchequer aforesaid at two times in the year, viz. in every Easter and Michaelmas term, as much as shall then remain unpaid after the rate of 20l for every month after such conviction; except in such cases where the king may by this act refuse the same and take two parts of the lands of such offender, till the said party being indicted for not coming to church contrary to former laws shall conform himself and come to church. s. 8.

And

And every conviction so recorded, shall by the justices before whom the record of the conviction shall be, be certified into the exchequer, before the end of the term following such conviction, in such convenient certainty for the time and other circumstances, as the court of exchequer may thereupon award process for the seizure of the lands and goods of every such offender as the cause shall require: And if default shall be made in any part of any payment aforesaid contrary to the form herein before limited; then, and so often, the king may by process out of the exchequer seize all the goods and two parts as well of all the lands leases and farms of such offender, as of all other lands liable to seizure or to the penalties aforesaid by the true meaning of this act, leaving the third part only of the said lands leases and farms for the maintenance of the offender his wife children and family. §. 9.

And the king shall have power to refuse the 20l a month tho' it be tendered ready to be paid, and thereupon to seize two parts in three to be divided as well of all the lands leases and farms that at the time of such seizure shall be or afterwards shall come to any such offender in not coming to church or to any other to his use, as of all other lands liable to such seizure or to the penalties aforesaid, and the same to retain till such offender shall conform himself, in lieu of the 20l monthly that during such his seizure and retainer shall incur. Saving to all persons (other than the offender his heirs or others claiming to his or their use) all leases rents conditions and other rights and titles made and done without fraud. §. 11.

But the king shall not take into his two parts, but leave to such offender, his chief mansion house, as part of his third part; and shall not demise lease nor put over the said two parts nor any part thereof to any recusant nor to his use: And whosoever shall take the same in lease or otherwise of his majesty, shall give such security not to commit nor suffer waste, as by the court of exchequer shall be allowed. §. 12.

And no indictment against any person for not coming to church, nor any proclamation, outlawry, or other proceeding thereupon shall be reversed for any default in form, nor otherwise than by direct traverse to the point of not coming to church. §. 16.

Provided, that if such person indicted shall submit and conform and repair to church, he may from thence be admitted to avoid and reverse the indictment and all proceedings thereupon, as if this act had not been made. §. 17.

And every of the said offences against this act may be inquired of heard and determined before the justices of the king's bench or of assize or before the justices of the peace in sessions. §. 36.

Shall be reversed for any default in form] But it hath been resolved, that the party is only restrained from taking advantages of defects in the record it self, and that he may plead any collateral matter, as a pardon, or a former conviction. 1 Haw. 17.

And that he may even reverse a judgment after verdict for any such defect in the record it self, as tends to the king's prejudice, as the omission of a capiatur, or the like; and that he may reverse an outlawry for any common defect, upon putting in bail, and traversing the indictment as to the point of not coming to church; which is very agreeable to the purport

purport of the whole clause, the latter part whereof seems manifestly to qualify the generality of the former. 1 Haw. 17.

XVI. *Perverting others or being perverted to popery.*

By the 23 El. c. 1. *All persons who shall have or pretend to have power or shall put in practice to absolve persuade or withdraw any of the subjects from their natural obedience, or to withdraw them for that intent from the established to the romish religion, or to move them to promise any obedience to any pretended authority of the see of Rome or of any other prince state or potentate to be had or used within this realm, or shall do any overt act to that intent or purpose, shall be guilty of high treason.* §. 2.

And if any person shall be willingly absolved or withdrawn as aforesaid, or willingly be reconciled, or shall promise any obedience to any such pretended authority prince state or potentate; he, his procurers and counsellors, shall be guilty of high treason. §. 2.

And all persons that shall wittingly be aiders or maintainers of such persons so offending, knowing the same, or shall conceal any such offence, and shall not within twenty days after their knowledge of the offence disclose the same to a justice of the peace or other high officer, shall be guilty of misprision of treason. §. 3.

Pretend to have power, or shall put in practice] Upon the indictment against *Campion* and others, 33 El. concerning which the judges were assembled at serjeants inn, it was resolved by them, that if any person shall pretend to have power to absolve, tho' he move none with an intent to draw them from their obedience; or shall move any with an intent to draw them from their obedience, tho' he pretend not to have power to absolve; both these acts, singly taken, are treason within the purview of this statute. *Gibbs.* 536.

XVII. *Entering into foreign service.*

By the 3 J. c. 4. *If any gentleman or person of higher degree, or any person that shall bear any office or place of captain, lieutenant, or any other place charge or office in camp army or company of soldiers or conduct of soldiers, shall go voluntarily out of the realm to serve any foreign prince state or potentate, or shall voluntarily serve any such, before he shall become bound by obligation with two such sureties as shall be allowed of by the officers who shall take the bond unto the king in the sum of 20 l at the least with condition to the effect following, shall be a felon. The tenor of which condition followeth:* §. 19.

That if the withinbounden A. B. shall not at any time then after be reconciled to the pope or see of Rome, nor shall enter into or consent unto any plot or conspiracy whatsoever against the king's majesty his heirs and successors or any his and their estate and estates realms or dominions, but shall within convenient time after knowledge thereof had reveal and disclose to the king's majesty his heirs and successors or some of the lords of his or their honourable privy council all such practices plots and conspiracies; that then the said obligation to be void. §. 20.

And the customer and comptroller of every port haven or creek, or one of them, or their or either of their deputy, may take the said bond; taking for the same 6d and no more. Which said customer and comptroller shall register and certify every such bond into the court of exchequer once every year, on pain of 5l. s. 21.

And where any such person shall pass out of the cinque ports or any member thereof; the lord warden of the cinque ports, or any person by him appointed, may take such bond as aforesaid. s. 42.

XVIII. Refusing the oaths and subscriptions.

1. By the 7 J. c. 6. If any person of or above the degree of a baron or baroness and above the age of eighteen years, shall stand and be presented indicted or convicted for not coming to church or not receiving the sacrament according to law, before the ordinary, or other having lawful power to take such presentment or indictment; then three of the privy council, whereof the lord chancellor lord treasurer lord privy seal or principal secretary to be one, upon knowledge thereof shall require such person to take the oaths of allegiance and supremacy: And if any other person of and above the said age and under the said degree, shall so stand and be presented indicted or convicted; or if the minister petty constable and churchwardens or any two of them shall complain to any justice of the peace near adjoining to the place where any person complained of shall dwell, and the said justice shall find cause of suspicion; then any one justice of the peace within whose commission or power such person shall be, or to whom complaint shall be made, shall upon notice thereof require such person to take the said oaths. And if any person being of the age of eighteen years or above shall refuse to take the said oaths duly tendered; then the persons authorized to give the said oaths shall commit him to the common gaol till the next assizes or sessions, where the said oaths shall be again in the said open sessions required of such person by the justices of assize or of the peace then and there present; and if he shall then also refuse, he shall incur a præmunire. (Except women covert; who shall be committed only to prison, there to remain without bail till they will take the said oaths.) s. 26.

And every person refusing to take the said oaths, shall be disabled to execute any publick place of judicature or bear any other office (being no office of inheritance or ministerial function), or to use or practice the common or civil law, or the science of physick or surgery, or the art of an apothecary, or any liberal science for gain. s. 27.

2. By the 13 C. 2. st. 2. c. 1. No person shall be placed elected or chosen to any office or place of mayor, alderman, recorder, bailiff, town clerk, common council man, or other office of magistracy place or trust or other employment relating to the government of cities, corporations, boroughs, cinque ports, and other port towns; who shall not have received the sacrament according to the rites of the church of England, within one year next before such election: and in default thereof, every such election and placing shall be void.

3. And by the 25 C. 2. c. 2. For preventing dangers which may happen from popish recusants; every person who shall be admitted into any office civil or military, shall within three months after his admittance receive the sacrament of the lord's supper, in some publick church on the lord's day immediately after

after divine service and sermon: And shall at the same time that he takes the oaths (which shall be within six months after his admittance, 9 G. 2. c. 26.) deliver into the court a certificate of his having so received the sacrament under the hands of the minister and churchwarden, and shall make proof of the truth thereof by two witnesses upon oath; all which shall be put upon record in the said court. f. 2, 3.

And if he shall neglect or refuse so to do, he shall be disabled to hold such office, and the same shall be void. f. 4.

And if he shall execute the same after such times expired, and be convicted thereupon in the courts at Westminster or at the assizes; he shall be disabled to sue or use any action bill plaint or information in course of law, or to prosecute any suit in any court of equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, and shall forfeit 500l to him who shall sue. f. 5.

And at the same time when he takes the oaths, he shall also make and subscribe this declaration following, under the same penalties and forfeitures, viz. I A. B. do declare, that I do believe that there is not any transubstantiation in the sacrament of the lord's supper, or in the elements of bread and wine, at or after the consecration thereof by any person whatsoever. f. 9.

4. And by the 7 & 8 W. c. 27. Every person who shall refuse to take the oaths of allegiance and supremacy, when tendred to him by any person lawfully authorized to administer or tender the same; or shall refuse or neglect to appear when lawfully summoned in order to have the said oaths tendred to him; —shall, until he have duly taken the said oaths, be liable to suffer as a popish recusant convict. And for the better levying the penalties to the king, the persons tendring the oaths shall upon such refusal or default of appearance record and enter in parchment the christian and surname and place of abode of such person so refusing or not appearing, together with the time of such tender and refusal or default of appearance, and shall deliver the said record or entry to the justices of assize at the next assizes, who shall forthwith estreat the same into the exchequer to be there entred of record, that the court may proceed thereupon as against popish recusants convict. f. 1.

And no person who shall refuse to take the said oaths, or being a quaker shall refuse to subscribe the declaration of fidelity (which oaths and subscription the sheriff or chief officer taking the poll at any election of members of parliament at the request of any one of the candidates shall administer) shall be admitted to give any vote at such election. f. 19.

5. And by the 1 G. ft. 2. c. 13. Two justices of the peace, or any other person who shall be by his majesty for that purpose specially appointed by order in the privy council or by commission under the great seal, may administer and tender the oaths of allegiance supremacy and abjuration to any person whom they shall suspect to be dangerous or disaffected to his majesty or his government: And if any person to whom the said oaths shall be so tendred shall neglect or refuse to take the same; such justices or other person specially to be appointed as aforesaid, tendring the said oaths, shall certify the refusal thereof to the next quarter sessions where such refusal shall be made; and the said refusal shall be recorded amongst the rolls of that sessions, and shall be from thence

certified by the clerk of the peace into the chancery or king's bench, there to be recorded amongst the rolls of such court, in a roll to be there kept for that purpose only; and every person so neglecting or refusing to take the said oaths, shall be from the time of such neglect or refusal adjudged a popish recusant convict. §. 10.

And two justices or any other person so specially appointed as aforesaid by writing under their hands and seals may summon any person to appear before them at a certain day and time therein to be appointed, to take the said oaths; which said summons shall be served upon such person or left at his dwelling house or usual place of abode with one of the family there; and if such person so summoned shall neglect or refuse to appear, then upon due proof upon oath of serving the said summons, such justices or other persons as aforesaid shall certify the same to the next sessions, there to be entred upon the rolls; and if such person shall neglect or refuse to appear and take the said oaths at the said sessions, the names of the person so certified being publicly read at the first meeting of the said sessions, such person shall be adjudged a popish recusant convict, and as such to forfeit and be proceeded against as if he had actually refused to take the oaths; and the same shall be from thence certified by the clerk of the peace into the chancery or king's bench, there to be recorded in a roll to be kept for that purpose only. §. 11.

XIX. Armour and ammunition.

1. By the 3 J. c. 5. All such armour gunpowder and munition, as any popish recusant convict shall have in his house or elsewhere, or in the possession of any other at his disposition, shall be taken from them by warrant of four justices of the peace at their general or quarter sessions to be holden in the county where such popish recusant shall be resident (other than such necessary weapons as shall be thought fit by the said justices to remain and be allowed for the defence of such recusant's person or house): and the said armour and munition so taken, shall be kept at the costs of such recusant, in such places as the said four justices at their said session shall appoint. §. 27.

And if such person shall refuse to declare unto the said justices or to any of them what armour he hath, or shall hinder or disturb the delivery thereof to any of the said justices or to any other person authorized by their warrant to take and seize the same; he shall forfeit his said armour gunpowder and munition, and shall also be imprisoned by warrant of any justices of the peace of such county for three months. §. 28.

And notwithstanding the taking away the same, the said popish recusant shall be charged with the maintaining of the same, and with the buying providing and maintaining of horse and other armour and munition, in such sort as other subjects shall be appointed and commanded according to their several abilities and qualities; and the said armour and munition, at the charge of such popish recusant for them, and as their own provision of armour and munition, shall be shewed at every muster shew or use of armour to be made within the said county. §. 29.

2. And by the 1 W. c. 15. It shall be lawful for any two justices of the peace, who shall know or suspect any person to be a papist, or shall be informed that

that any person is or is suspected to be a papist, to tender, and they shall forthwith tender to him the declaration of the 30 C. 2. st. 2. c. 1.: and if he shall refuse to make and subscribe the same, or shall refuse or forbear to appear before the said justices for the making and subscribing the same upon notice to him given or left at his usual place of abode by any person authorized in that behalf by warrant of the said justices; he shall from thenceforth be liable to all the penalties forfeitures and disabilities in this act mentioned. §. 2.

And the said justices shall certify the name surname and usual place of abode of every such person, who being required shall refuse or neglect to make and subscribe the said declaration, or to appear before them for that purpose; as also of every person who shall make and subscribe the same,—at the next sessions, to be there filed and kept amongst the records. §. 3.

And no papist or reputed papist so refusing or making default, shall have in his house or elsewhere, or in the possession of any other to his use or at his disposition, any arms weapons gunpowder or ammunition (other than such necessary weapons as shall be allowed to him by order of the justices in sessions, for the defence of his house or person): and two justices by their warrant may authorize any person in the day time, with the assistance of the constable or his deputy, to search for all arms weapons gunpowder or ammunition, which shall be in the house custody or possession of any such papist or reputed papist, and seize the same for the use of the king; which said justices shall at the next sessions deliver the same in open court for the use aforesaid. §. 4.

And every papist or reputed papist who shall not within ten days after such refusal or making default as aforesaid, discover and deliver or cause to be delivered to some justice of the peace, all arms weapons gunpowder or ammunition whatsoever, which he shall have in his house or elsewhere, or which shall be in the possession of any person to his use; or shall hinder or disturb any person authorized by warrant of two justices to search for and seize the same;—shall be committed to the common gaol by warrant of two justices for three months without bail, and shall also forfeit the said arms and pay treble the value of them to the king, to be appraised by the justices at the next sessions. §. 5.

And every person who shall conceal, or be privy or aiding or assisting to conceal, or who knowing thereof shall not discover to a justice of the peace the arms weapons gunpowder or ammunition of any person so refusing or making default, or shall hinder or disturb any person authorized as aforesaid in searching for taking and seizing the same, shall be committed to the common gaol by two justices for three months without bail, and shall also forfeit treble value of the said arms to the king. §. 6.

And if any person shall discover any concealed arms weapons ammunition or gunpowder belonging to any person refusing or making default as aforesaid, so as the same may be seized; the justices on delivery of the same at the sessions, shall as a reward for such discovery, by order of sessions allow him a sum of money amounting to the full value of the arms weapons ammunition or gunpowder so discovered: the said sum to be assessed by the judgment of the said justices at their said sessions, and to be levied by distress and sale of the goods of the offender. §. 7.

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But if any person who shall have so refused or made default, shall desire to submit and conform, and for that purpose shall present himself before the justices at the next sessions where his default shall be certified, and shall there in open court make and subscribe the said declaration and take the oaths of allegiance and supremacy, he shall be discharged. s. 8.

XX. Horses.

No papist or reputed papist, so refusing or making default in making and subscribing the declaration as by the last mentioned act of the 1 W. c. 15. shall have or keep in his possession any horse above the value of 5 l.; and two justices by their warrant may authorize any person, with the assistance of the constable or his deputy, to search for and seize the same for the use of the king. 1 W. c. 15. s. 9.

And if any person shall conceal, or be aiding in concealing any such horse, he shall be committed to prison by such warrant without bail for three months, and shall also forfeit to the king treble value of such horse, which value is to be settled as aforesaid. s. 10.

XXI. Popish baptism.

Every popish recusant who shall have a child born, shall within one month next after the birth, cause the same to be baptized by a lawful minister, according to the laws of the realm, in the open church of the parish where the child shall be born, or in some other church near adjoining, or chapel where baptism is usually administered; or if by infirmity of the child it cannot be brought to such place, then the same shall within the time aforesaid be baptized by the lawful minister of any of the said parishes or places: on pain that the father of such child if he be living one month after the birth, or if he be dead then the mother of such child shall forfeit 100 l.; one third to the king, one third to him who shall sue in any of the king's courts of record, and one third to the poor of the said parish. 3 J. c. 5. s. 14.

XXII. Popish marriage.

1. By the 3 J. c. 5. Every man being a popish recusant convict, who shall be married otherwise than in some open church or chapel, and otherwise than according to the orders of the church of England, by a minister lawfully authorized, shall be disabled to have any estate of freehold into any lands of his wife as tenant by courtesy; and every woman being a popish recusant convict, who shall be married in other form than as aforesaid, shall be disabled not only to claim any dower of the inheritance of her husband, or any jointure of the lands of her husband, but also of her widow's estate and frank-bank in any customary lands whereof her husband died seized, and likewise be disabled to have any part of her husband's goods: And if any such man shall be married with any woman, otherwise than as aforesaid, which woman shall have no lands whereof he may be intitled to be tenant by the courtesy; he shall forfeit

feit 100*l*, half to the king, and half to him that shall sue in any of the king's courts of record. 1. 13.

2. But by the 26 G. 2. c. 33. After march 25, 1754, if they shall be married any where in England, other than in a church or publick chapel (unless by special licence from the archbishop of Canterbury), or without publication of banns, or licence, the marriage shall be void.

XXIII. Popish burial.

If any popish recusant, man or woman, not being excommunicate, shall be buried in any place, other than in the church or church yard, or not according to the ecclesiastical laws of this realm; the executors or administrators of every such person so buried, knowing the same, or the party that causeth him or her to be so buried, shall forfeit 20*l*, one third to the king, one third to him that shall sue in any of the king's courts of record, and one third to the poor of the parish where such person died. 3 J. c. 5. f. 15.

XXIV. Heirs of popish recusants.

If any recusant shall die, his heir being no recusant; such heir shall be freed from all penalties and incumbrances in respect of his ancestor's recusancy: And if at the decease of such recusant his heir shall be a recusant, and after shall become conformable and obedient to the laws of the church, and repair to church, and continue there during the time of divine service and sermons, and also shall take the oaths of allegiance and supremacy before the archbishop or bishop of the diocese; such heir shall be freed from all penalties and incumbrances happening by reason of his ancestor's recusancy. 1 J. c. 4. f. 3. 1 W. c. 8.

But if the heir of any recusant shall be within the age of sixteen years at the decease of his ancestor, and shall after his age of sixteen years become a recusant; such heir shall not be freed of any of the penalties and incumbrances happening by reason of his ancestor's recusancy, until he shall submit or reform himself, and become obedient to the laws of the church, and repair to church, and take the oaths of allegiance and supremacy as aforesaid; and yet nevertheless, from and after such submission and oath taken, every such heir shall be freed from all penalties and incumbrances happening by reason of his ancestor's recusancy. 1 Ja. c. 4. f. 4. 1 W. c. 8.

XXV. Popish wife.

1. By the 3 J. c. 5. Every married woman being a popish recusant convicted (her husband not being a popish recusant convicted) who shall not conform herself, but shall forbear to repair to some church or usual place of common prayer there to hear divine service and to receive the sacrament, by the space of one whole year next before the death of her husband, — shall forfeit to the king the issues and profits of two parts of her jointure and of her dower during her life, out of any lands which were her husband's, and also be disabled to be executrix or administratrix of her said husband, and to have or demand any part or portion of her said deceased husband's goods or chattels. f. 10.

2. And

Popery.

2. And by the 7 J. c. 6. If any married woman being convicted as a popish recusant for not coming to church, shall not in three months conform herself and repair to church and receive the sacrament; she shall be committed to prison by one of the privy council, or the bishop of the diocese, if she be a baroness; or if she be under that degree, by two justices of the peace (one whereof to be of the quorum), until she shall conform her self and come to church and receive the sacrament; unless her husband shall pay to the king 10 l a month, or the third part of his lands at his own choice, so long as she remaining a recusant convict shall continue out of prison. s. 28.

XXVI. Popish servants or sojourners.

By the 3 J. c. 4. Every person who shall willingly maintain retain relieve keep or harbour in his house, any servant sojourner or stranger who shall not repair to some church or chapel or usual place of common prayer to hear divine service, but shall forbear the same for a month together, not having a reasonable excuse, shall forfeit 10 l a month. s. 32.

And every person who shall knowingly retain or keep in his service fee or livery, any person who shall not repair to some church chapel or usual place of common prayer to hear divine service, but shall forbear the same for a month together, shall forfeit 10 l a month. s. 33.

But this shall not extend to punish or impeach any person, for maintaining retaining relieving keeping or harbouring his father or mother wanting (without fraud or covin) other habitation or sufficient maintenance, or the ward of any such person, or any person that shall be committed by authority to the custody of any by whom they shall be so relieved maintained or kept. s. 34.

The said offences to be inquired of heard and determined, before the justices of the king's bench, or of assize, or before the justices of the peace in sessions. s. 36.

XXVII. Popish schoolmasters.

1. By the 23 El. c. 1. If any person shall keep or maintain any schoolmaster, which shall not repair to church or be allowed by the bishop of the diocese; he shall forfeit 10 l a month. s. 6.

Provided, that no such ordinary, or their ministers, shall take any thing for the said allowance. — And if such schoolmaster or teacher shall teach contrary to this act; he shall be disabled to be a teacher of youth, and be imprisoned for a year. s. 7.

The said forfeiture to be, one third to the king to his own use; one third to the king for relief of the poor in the parish where the offence shall be committed, to be delivered by warrant to the principal officers in the receipt of the exchequer without further warrant from the king; and one third to him who shall sue: and if such person shall not be able, or shall fail to pay the same within three months after judgment given, he shall be committed to prison till he have paid the same, or conform himself to go to church. s. 11.

But if the offender shall, before he be indicted, or at his arraignment or trial before judgment, submit and conform himself before the bishop of the diocese, or before the justices where he shall be indicted arraigned or tried (having

(having not before made like submission at his trial being indicted for the first offence); he shall be discharged, upon his recognition of such submission in open assizes or sessions of the county where he shall be resident. s. 10.

2. And by the 1 J. c. 4. No person shall keep any school or be a schoolmaster, out of any of the universities or colleges of this realm, except it be in some publick or free grammar school, or in some such nobleman's or gentleman's house as are not recusants, or where the schoolmaster shall be specially licensed by the archbishop bishop or guardian of the spiritualities of the diocese; on pain that as well the schoolmaster, as also the party that shall retain or maintain any such schoolmaster, shall forfeit each of them 40s. a day: the one half of which forfeitures shall be to the king, and half to him that will sue. s. 9.

3. And by the 11 & 12 W. c. 4. If any papist, or person making profession of the popish religion, shall keep school, or take upon himself the education or government or boarding of youth; he shall be adjudged to perpetual imprisonment, in such place within this realm, as the king by advice of the privy council shall appoint. s. 3.

XXVIII. Papists shall not succeed to the crown of this realm.

1. By the 1 W. sess. 2. c. 2. Every person that shall be reconciled to or shall hold communion with the see or church of Rome, or shall profess the popish religion, or shall marry a papist, shall be excluded and be for ever incapable to inherit possess or enjoy the crown and government of this realm; and in such case the people shall be absolved of their allegiance; and the crown shall descend to and be enjoyed by such person being a protestant, as should have inherited and enjoyed the same, in case the person so reconciled, holding communion, or professing, or marrying as aforesaid were naturally dead. s. 9.

And every king and queen who shall come to and succeed in the imperial crown of this kingdom, shall on the first day of the meeting of the first parliament next after their coming to the crown, sitting on the throne in the house of peers in the presence of the lords and commons, or at their coronation before such person who shall administer the coronation oath at the time of their taking the said oath (which shall first happen)——make and subscribe the declaration of the 30 C. 2. But if he or she shall be under the age of twelve years, then every such king or queen shall make and subscribe the same at their coronation, or the first day of the meeting of the first parliament as aforesaid, which shall first happen after such king or queen shall have attained the said age of twelve years. s. 10.

2. And by the second article of the union of the kingdoms of England and Scotland, All papists, and persons marrying papists, shall be excluded from, and for ever incapable to inherit possess or enjoy the imperial crown of Great Britain and the dominions thereunto belonging; and in every such case, the crown and government shall descend to and be enjoyed by such person being a protestant, as should have inherited and enjoyed the same, in case such papist or person marrying a papist was naturally dead. 5 An. c. 8.

XXIX. *Papists shall not sit in either House of parliament.*

By the 30 C. 2. ft. 2. c. 1. *No person that shall be a peer of the realm, or member of the house of peers, shall vote or make his proxy in the house of peers, or sit there during any debate in the said house of peers; nor any person that shall be a member of the house of commons, shall vote in the house of commons, or sit there during any debate after the speaker is chosen; until he shall first take the oaths of allegiance and supremacy (and abjuration, 1 G. ft. 2. c. 13.) and make and subscribe this declaration following; viz.*

I A. B. do solemnly and sincerely, in the presence of god, profess, testify, and declare, That I do believe that in the sacrament of the lord's supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ, at or after the consecration thereof, by any person whatsoever: And that the invocation, or adoration of the virgin Mary, or any other saint, and the sacrifice of the mass, as they are now used in the church of Rome, are superstitious and idolatrous. And I do solemnly in the presence of god, profess, testify, and declare, That I do make this declaration, and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by english protestants, without any evasion, equivocation, or mental reservation whatsoever, and without any dispensation already granted me for this purpose by the pope or any other authority or person whatsoever, or without any hope of any such dispensation from any person or authority whatsoever, or without thinking that I am or can be acquitted before god or man, or absolved of this declaration, or any part thereof, altho' the pope, or any other person or persons, or power whatsoever, shall dispense with or annul the same, or declare that it was null or void from the beginning. s. 2, 3.

Which said oaths and declaration shall be solemnly and publicly made and subscribed betwixt the hours of nine in the morning and four in the afternoon, by every such peer and member of the house of peers at the table in the middle of the house, before he take his place in the house, and whilst a full house of peers is there with their speaker in his place; and by every such member of the house of commons, at the table in the middle of the said house, and whilst a full house of commons is there duly sitting with their speaker in his chair: and the same to be done in either house in such like order or method, as each house is called over by respectively. s. 4.

And if any peer or member of the house of peers, or member of the house of commons, shall offend against this act; he shall be deemed and adjudged a popish recusant convict, and shall forfeit and suffer as a popish recusant convict; and shall be disabled to execute any office or place of profit or trust, civil or military; or to sit or vote in either house of parliament, or to make a proxy in the house of peers; or to sue or use any action, bill, plaint, or information in course of law, or to prosecute any suit in any court of equity; or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift; (or to vote at any election for members of parliament, 1 G. ft. 2. c. 13;) and shall forfeit 500l to him who shall sue. s. 6.

And it shall be lawful for the house of peers and house of commons, or either of them respectively, as often as they shall see occasion, to order and cause all or any of the members of their respective houses, openly in their respective houses of parliament, to take the said oaths, and to make and subscribe the said declaration, at such times, and in such manner, as they shall appoint: And if any peer shall, contrary to such order made by their said house, wilfully presume to sit therein, without taking the said oaths and subscribing the said declaration; he shall be disabled to sit in the said house of peers and give any voice therein either by proxy or otherwise, during that parliament: And if any member of the house of commons shall contrary to such order made by their house, wilfully presume to sit therein, without taking the said oaths, and making and subscribing the said declaration; he shall be disabled to sit in the said house of commons, or to give any voice therein, during that parliament. f. 7.

And where any member of the house of commons shall be so disabled to sit or vote, his place shall be void; and a writ shall issue for the election of a new member. f. 8.

And during the time of taking the said oaths and making and subscribing the declaration, all proceedings shall cease; and the said oaths declaration and subscription, together with a schedule of the names of the persons who shall take and subscribe the same, shall be made and entred in parchment rolls provided by the clerk of the house of lords and the clerk of the house of commons; and none of the peers or members shall pay to such clerk above 12d for such entry: All which rolls the said clerks shall without fee shew to any person desiring to look upon the same. f. 11.

XXX. Papists shall not present to benefices.

1. By the 3 J. c. 5. Every person being a popish recusant convict, shall be utterly disabled to present to any benefice with cure or without cure, prebend, or any other ecclesiastical living; or to collate or nominate to any free school, hospital, or donative; or to grant any avoidance of any benefice, prebend, or other ecclesiastical living. f. 18.

And the chancellor and scholars of the university of Oxford, so often as any of them shall be void, shall have the presentation, nomination, collation, and donation of and to every such benefice, prebend, or ecclesiastical living, school, hospital, and donative, in the counties of Oxford, Kent, Middlesex, Suffex, Surrey, Hampshire, Berkshire, Buckinghamshire, Gloucestershire, Worcestershire, Staffordshire, Warwickshire, Wiltshire, Somersetshire, Devonshire, Cornwall, Dorsetshire, Herefordshire, Northamptonshire, Pembrokehire, Caermarthenhire, Brecknockshire, Monmouthshire, Cardiganshire, Montgomeryshire, the city of London, and in every city and town being a county of it self within any of the limits and precincts of any of the counties aforesaid, as shall happen to be void during such time as the patron thereof shall be a recusant convict as aforesaid. f. 19.

And the chancellor and scholars of the university of Cambridge shall have the presentation, nomination, collation, and donation of and to every such benefice, prebend, or ecclesiastical living, school, hospital, and donative, within

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the counties of Essex, Hertfordshire, Bedfordshire, Cambridgeshire, Huntingdonshire, Suffolk, Norfolk, Lincolnshire, Rutlandshire, Leicestershire, Derbyshire, Nottinghamshire, Shropshire, Cheshire, Lancashire, Yorkshire, the county of Durham, Northumberland, Cumberland, Westmerland, Radnorshire, Denbeshire, Flintshire, Carnarvonshire, Angleseyshire, Merionethshire, Glamorganshire, and in every city and town being a county of itself within the limits and precincts of any of the said counties, as shall happen to be void during such time as the patron thereof shall be a recusant convicted as aforesaid. f. 20.

Provided, that neither of the said chancellors nor scholars of either of the said universities, shall present or nominate to any benefice with cure, prebend, or other ecclesiastical living, any such person as shall then have any other benefice with cure of souls: And if any such presentation or nomination shall be made of any such person so beneficed, the same shall be void. f. 21.

Being a popish recusant convicted] And this, whether he be convicted before the avoidance or after; for the words are general, that the university shall present so often as any such benefices shall be void; and avoidances before conviction are within the same mischief as avoidances after; and it would be a hard construction, that general words shall not be extended to remedy all cases which are within equal mischief. *Comyns 182. Gibf. 771.*

Shall be utterly disabled] They were utterly disabled before, by being made excommunicate, in sect. 2. as was observed by *Finch* solicitor, in the case of *Knight and Dauncer*; and therefore of what force soever institution or induction when given upon such a presentation, may be against strangers, there is no doubt but the bishop may refuse to give it, and take the benefit of the lapse, in case no other presents, who hath right, and is capable of presenting. For that the bishop in this case, as in others, hath right to lapse, appears from hence, that the statute intended no more than to put the university in the place of the patron; all rights which belong to others, remaining as they were before. *Gibf. 771.*

To present] Hereby the patron is only disabled to present; and he continues patron as to all other purposes; and therefore he shall confirm the leases of the incumbent. 1 *Haw. 32.*

Or to grant any avoidance] But such person, by being disabled to grant an avoidance, is no way hindered from granting the advowson itself in fee, or for life or years, bona fide, and for good consideration. 1 *Haw. 32.*

And the chancellor and scholars] The two clauses which give this benefit to the universities respectively, are private clauses, whereof the judges, without pleading of them, cannot take notice. 10 *Co. 57.*

So often as any of them shall be void] But if an advowson or avoidance, belonging to such a person, come into the king's hands, by reason of an outlawry, or conviction of recusancy, or the like; the king, and not the university, shall present. 1 *Haw. 32.*

During such time as the patron thereof shall be a recusant convicted] When the presentation for that turn is vested in the university, altho' afterwards the recusant conformeth himself, or dieth, yet the university shall present. 10 *Co. 57.*

2. By the 1 W. c. 26. Every person who shall refuse or neglect to make and subscribe the declaration of the 30 C. 2. when the same shall be tendered by two justices of the peace as in the said act is mentioned; or who shall, upon notice given as by the said act, refuse or forbear to appear before them for the making and subscribing thereof, and shall thereupon have his name surname and place of abode certified and recorded at the sessions;—every such person so recorded, shall be from thenceforth adjudged disabled to make such presentation, collation, nomination, donation, or grant of any avoidance of any benefice, prebend, or ecclesiastical living, as fully as if such person were a popish recusant convict. And the universities shall have the presentation, nomination, collation, and donation. §. 2.

And where any person shall be seized or possessed of any advowson, right of presentation, collation, or nomination to any such ecclesiastical living, free school, or hospital as aforesaid, in trust for any papist or popish recusant, who shall be convicted or disabled as by the 3 J. c. 5. or by this act; he shall be disabled to present nominate or collate to any such ecclesiastical living free school or hospital, or to grant any avoidance thereof, and such presentations nominations collations and grants shall be void; and the universities shall proceed, as if such recusant convict or disabled were seized or possessed thereof. §. 3.

And if any trustee or mortgagee or grantee of any avoidance shall present nominate or collate, or cause to be presented nominated or collated any person to any such ecclesiastical living free school or hospital, whereof the trust shall be for any recusant convict or disabled, without giving notice of the avoidance in writing to the vicechancellor within three months next after the avoidance; he shall forfeit 500l to the respective chancellor and scholars of the university, to whom the presentation nomination or collation shall belong. §. 4.

Provided, that the said chancellors and scholars of either university, shall not present or nominate to any benefice with cure prebend or other ecclesiastical living, any person as shall then have any other benefice with cure of souls; and if any such presentment shall be had or made of any such person so beneficed, the same shall be utterly void. §. 5.

And if any person so presented or nominated to any benefice with cure, shall be absent from the same above sixty days in any one year; in such case the said benefice shall be void. §. 6.

Provided always, that if any such person shall present himself at the sessions for that place where his name was recorded, and shall there in open court make and subscribe the said declaration, and take the oaths (of allegiance and supremacy, 1 W. c. 8.); he shall be discharged of the said disability, and be enabled to make such presentment collation nomination donation and grant, as if this act had not been made. §. 7.

S. 2. *Refuse or forbear*] In the case of Fitzherbert and the university of Oxford, the party was summoned to take the oaths, but refused to attend. Upon which occasion, it was declared by the court, that the justices ought to be present at the time appointed; and if they are not there, it is a good excuse for the party, if the party attends; but there is no necessity that the justices should be present, if the party does not come; it is sufficient if they leave notice at the place, to give them notice if the party comes; and the party himself is obliged to do the first act, namely, to attend at the time and place appointed. Comyns 183. 3 And

3. And by the 12 An. st. 2. c. 14. it is further enacted, that every papist or person making profession of the popish religion, and every child of such person not being a protestant under the age of twenty one years, and every mortgagee trustee or person any way intrusted directly or indirectly, mediately or immediately, by or for such papist or person making profession of the popish religion or such child as aforesaid, whether such trust be declared by writing or not, shall be disabled to present collate and nominate to any benefice prebend or ecclesiastical living school hospital or donative, or to grant any avoidance of any benefice prebend or ecclesiastical living; and every such presentment collation nomination and grant, and every admission institution and induction thereupon shall be void: and the universities shall have the presentation nomination collation and donation. s. 1.

And when any presentation to any benefice or ecclesiastical living shall be brought to any archbishop bishop or other ordinary, from any person who shall be reputed to be, or whom such archbishop bishop or other ordinary shall have cause to suspect to be a papist or trustee of any person making profession of the popish religion, or suspected to be such; such archbishop bishop or other ordinary shall tender or administer to every such person (if present) the declaration against transubstantiation of the 25 C. 2. and if absent, shall by notice in writing to be left at the place of habitation of such person, appoint some convenient time and place when and where such person shall appear before such archbishop bishop or other ordinary, or some persons to be authorized by them by commission under their seal of office; who shall, upon such appearance, tender or administer the said declaration to the party making such presentation: and if he shall neglect or refuse to make and subscribe the declaration so tendered, or shall neglect or refuse to appear upon such notice, such presentation shall be void; and in such case the archbishop bishop or other ordinary shall, within ten days after such neglect or refusal, send and give a certificate under their seal of office of such neglect or refusal to the vicechancellor; and the presentation to such benefice, for that turn only, shall be vested in the respective chancellor and scholars. s. 2.

And for the better discovery of secret trusts and fraudulent conveyances made by papists, it is enacted, that when the presentation of any person presented to any benefice or ecclesiastical living shall be brought to any archbishop bishop or other ordinary; he shall, before he give institution, examine the person presented upon oath, whether to the best and utmost of his knowledge and belief, the person who made such presentation be the true and real patron, or made the same in his own right, or whether he be not mediately or immediately, directly or indirectly, trustee or any way intrusted for some other, and whom by name, who is a papist or maketh profession of the popish religion, or the children of such, or for any other and whom, or what he knows, has heard, or believes touching the same; and if such person so presented shall refuse to be examined, or shall not answer directly, the presentation shall be void. s. 3.

And the chancellor and scholars of the respective universities, to whom the presentation to such benefices and ecclesiastical livings should belong in case the rightful patrons had been popish recusants convicted, and their presentees or clerks, may for the better discovery of such secret and fraudulent trusts, exhibit their bill in any court of equity, against such person presenting, and such person

son as they have reason to believe to be the cestuy que trust of the advowson, or any other person who they have cause to suspect may be able to make any other or further discovery of such secret trusts and practices; to which bill, the defendants being duly served with process of the court, shall forthwith directly answer: and if they shall refuse or neglect to answer, in such time as shall be appointed by the court, the bill shall be taken pro confesso, and be allowed as evidence against such person so neglecting and refusing, and his trustees, and his or their clerk; provided, that every person having fully answered such bill, and not knowing of any such trust, shall be intitled to his costs to be taxed according to the course of the court. §. 4.

And the court where any quare impedit shall be depending, at the instance of the said chancellor and scholars or their clerk being plaintiffs or defendants in such suit by motion in open court, may make a rule or order requiring satisfaction upon the oath of such patron and his clerk, who in the said suit shall contest the right of the university to present, by examination of them in open court, or by commission under the seal of such court for the examination of them, or by affidavit, as the said court shall find most proper, in order to the discovery of any secret trust frauds or practices relating to the said presentation; and if it appear to the court, upon the examination of such patron or clerk, that the said patron is but a trustee, then they shall discover who the person is and where he lives; and upon their refusal to make such discovery, or to give satisfaction as aforesaid, they shall be punished as guilty of a contempt of the court: And if the said patron or his clerk shall discover the person for whom the said patron is a trustee; then the court, on motion made in open court, shall make a rule or order, that the person for whom the patron is a trustee shall in the said court, or before commissioners to be appointed for that purpose under the seal of the said court, make and subscribe the declaration against transubstantiation of the 25 C. 2. and likewise on pain of incurring a contempt of the said court, shall give such further satisfaction upon oath relating to the said trust, as the court shall think fit: and such person so required to make and subscribe the said declaration, and refusing or neglecting so to do, shall be esteemed as a popish recusant convict in respect of such presentation. §. 5.

And the answer of such patron and the person for whom he is intrusted and his and their clerk or any of them, and their examinations and affidavits taken as aforesaid by order of any court where such quare impedit shall be depending, or by any archbishop bishop or other ordinary, or the commissioners as aforesaid (which examinations shall therefore be reduced into writing and signed by the party examined) shall be allowed as evidence against such patron so presenting, and his clerk. §. 6.

Provided, that no such bill, nor any discovery to be made by any answer thereunto, or to any such examination as aforesaid, shall be made use of to subject any person making such discovery or not answering such bill, to any penalty or forfeiture, other than the loss of the presentation then in question. §. 7.

And in case of any such bill of discovery exhibited by the chancellor and scholars or their presentee, no lapse shall incur, nor plenary be a bar against them, in respect of the benefice or ecclesiastical living touching which such bill shall be exhibited, till after three months from the time that the answer to such bill shall be

be put in, or the same be taken *pro confesso*, or the prosecution thereof deserted, provided that such bill be exhibited before any lapse incurred. §. 8.

And the chancellor and scholars may sue a writ of *quare impedit* by the name of chancellor and scholars, or by their proper names of incorporation, at their election. §. 9.

And in case of any such trust confessed or discovered by any answer to such bill or such examination as aforesaid, the court may enforce the producing of the deeds relating to the said trusts, by such methods as they shall find proper. §. 10.

4. And by the 11 G. 2. c. 17. it is further enacted, that every grant to be made of any advowson or right of presentation collation nomination or donation of and to any benefice prebend or ecclesiastical living school hospital or donative, and every grant of any avoidance thereof, by any papist or person making profession of the popish religion, whether such trust be declared by writing or not, shall be null and void, unless such grant be made *bona fide* and for a full and valuable consideration to and for a protestant purchaser and merely and only for the benefit of a protestant; and every such grantee or person claiming under any such grant shall be deemed to be a trustee for a papist or person professing the popish religion within the aforesaid act of the 12 An.; and all such grantees, and persons claiming under such grants, and their presentees, shall be compelled to make such discovery relating to such grants and presentations made thereupon, and by such methods, as by the said act. And every devise to be made by any papist or person professing the popish religion, of any such advowson or right of presentation collation nomination or donation or any such avoidance, with intent to secure the benefit thereof to the heirs or family of such papist or person professing the popish religion, shall be null and void; and all such devisees, and persons claiming under such devises, and their presentees, shall in like manner be compelled to discover, whether to the best of their knowledge and belief, such devises were not made to the said intent. §. 5.

XXXI. Shall be as excommunicated.

1. By the 3 J. c. 5. Every popish recusant convict shall stand and be reputed to all intents and purposes disabled, as a person lawfully and duly excommunicated, and as if he had been so denounced and excommunicated according to the laws of this realm, until he shall conform himself and come to church and hear divine service and receive the sacrament according to the laws of this realm, and take the oaths (of allegiance and supremacy, 1 W. c. 8.); and every person sued by such person so to be disabled, may plead the same in disabling of such plaintiff, as if he were excommunicated by sentence in the ecclesiastical court. §. 11.

2. And by the 3 J. c. 4. Upon any lawful writ warrant or process awarded to any sheriff or other officer, for the taking of any popish recusant (actually) excommunicated for such recusancy; it shall be lawful for such sheriff or other officer, if need be, to break open any house wherein such person excommunicate shall be, or to raise the power of the county, for the apprehending of such person, and the better execution of such warrant writ or process. §. 35.

XXXII. Shall not repair to court.

1. By the 3 J. c. 5. No popish recusant convict shall come into the court or house where the king or his heir apparent to the crown shall be, unless he be commanded so to do by the king, or by warrant from the lords and others of the privy council; on pain of 100*l*, half to the king, and half to him that shall sue in any of his majesty's courts of record. s. 2.

2. And by the 30 C. 2. st. 2. c. 1. Every peer of this realm, and member of the house of peers, and every peer of Scotland or Ireland, being of the age of one and twenty years or upwards, not having taken the oaths (of allegiance and supremacy, 1 W. c. 8.) and made and subscribed the declaration against popery of the 30 C. 2. st. 2. c. 1, and every member of the house of commons not having taken the said oaths and made and subscribed the said declaration, and every person convicted of popish recusancy, who shall come advisedly into or remain in the presence of the king, or shall come into the court or house where he resides, shall suffer all the pains forfeitures and disabilities of this act; unless he do in the next term after such his coming or remaining take the said oaths, and make and subscribe the said declaration, in the high court of chancery, between the hours of nine and twelve in the forenoon: That is to say, he shall be disabled to execute any office or place of profit or trust, civil or military; or to sit or vote in either house of parliament, or to make a proxy in the house of peers; or to sue or use any action, bill, plaint, or information in course of law, or to prosecute any suit in any court of equity; or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift; and shall forfeit 500*l* to him who shall sue. s. 5, 6.

But this act shall not extend to the prejudice of any person for coming into or remaining in the presence of the king, who shall first have licence so to do by warrant under the hands and seals of six privy counsellors, by order of his majesty's privy council, upon some urgent occasion therein to be expressed; so as such licence exceed not ten days, and that it be first filed and put upon record in the office of the petty bag in chancery, for any one to view without fee: and no person to be licensed above thirty days in any one year. s. 12.

Provided, that if any offender shall after such offence take the oaths and subscribe the declaration in the chancery in manner aforesaid; he shall from thenceforth be freed and discharged from all seizures penalties and losses which he might otherwise sustain by reason of being a popish recusant convict by virtue of this act, and from all disabilities and incapacities incurred thereby: so as such freedom and discharge extend not to restore any such person to any office or place filled up, nor to any other office till after a year from taking the said oaths and making the said declaration; nor to make void the said forfeiture of 500*l*. s. 13.

XXXIII. Shall not come within ten miles of London.

1. By the 3 J. c. 5. All popish recusants who shall come dwell or remain within the city of London or within ten miles thereof, who shall be indicted or convicted of recusancy, or who shall not repair unto some usual church or chapel

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chapel and there bear divine service, but shall forbear the same by the space of three months, shall within ten days after such indictment or conviction depart from the said city and ten miles compass of the same, and also shall deliver up their names to the lord mayor if such recusant be within the city or the liberties thereof; and if the said recusant shall dwell or remain in any other county within ten miles of the said city, then he shall within the said ten days deliver up his name to the next justice of the peace within such county: on pain of forfeiting to the king 100*l*; half of which shall be to the king, and half to him that will sue in any of the king's courts of record. *l*. 4.

2. And by the 1 W. c. 9. For the better discovering and amending all papists and reputed papists out of London and Westminster and ten miles of the same; the lord mayor, and every justice of the peace of London Westminster and Southwark, and of the counties of Middlesex Surrey Kent (and Essex, 1 W. c. 17.) shall cause to be arrested and brought before him every person, not being a merchant foreigner, as is reputed to be a papist, and tender to him the declaration of the 30 C. 2. *l*. 2. c. 1. and if he refuse to make and subscribe the same, and shall after such refusal continue within the said distance, he shall forfeit and suffer as a popish recusant convicted. *l*. 2.

And every justice of the peace shall certify every such subscription before him taken, and also the names of all persons refusing upon tender to make or subscribe as aforesaid, under his hand and seal, into the court of king's bench the next term, or else at the next quarter sessions of the county or place where such taking, subscribing, or refusal shall happen: And if the said person, so refusing and certified, shall not within the next term or sessions after such refusal appear in the court of king's bench or sessions where such certificate shall be returned, and in open court make and subscribe the same, and indorse or enter his so doing upon the certificate so returned; he shall be from the time of such his neglect or refusal taken and adjudged a popish recusant convicted, and as such to forfeit and be proceeded against. *l*. 3.

But this act not to extend to any foreigner being a menial servant to any ambassador or publick agent. *l*. 4.

XXXIV. Shall not remove above five miles from their habitation.

1. By the 35 El. c. 2. Every person above the age of sixteen, and having any certain place of abode, who being a popish recusant shall be convicted for not repairing to church, and being within this realm at the time he shall be convicted, shall within forty days next after such conviction (if not restrained by imprisonment, or by the king's command, or by order of six or more of the privy council, or by sickness, and in case of such restraint then within twenty days after the removal of such restraint) repair to his place of usual dwelling and abode, and shall not at any time after remove above five miles from thence; on pain of forfeiting his goods, and also of forfeiting to the king all his lands rents and annuities during life. *l*. 3.

And every such offender which hath copyhold or customary lands, shall forfeit the same during his life to the lord of the manor, if such lord be not a popish recusant convicted; and if he be, then such forfeiture shall be to the king. *l*. 5.

And all such persons as are to repair to their place of dwelling and abode, and not to remove above five miles from thence as is aforesaid, shall within twenty days next after coming to such place notify their coming thither, and present themselves and deliver their true names in writing, to the minister or curate of the parish and to a constable of the town; and thereupon the said minister or curate shall enter the same in a book to be kept in every parish for that purpose. §. 6.

And the said minister or curate and the said constable shall certify the same in writing to the next general or quarter sessions, to be entred by the clerk of the peace in the rolls of the sessions. §. 7.

*And if any such person, being a popish recusant (not being a feme covert, and not having lands of the clear yearly value of twenty marks, or goods above the value of 40*l.*) shall not within the time before limited repair to his place of usual dwelling and abode, and thereupon notify his coming as aforesaid; or at any time after his repairing to any such place, shall pass or remove above five miles from thence; and shall not within three months next after he shall be apprehended for offending as aforesaid, conform himself in coming to church, and in making such publick confession and submission as is herein after directed, being thereunto required by the bishop of the diocese, or a justice of the peace, or by the minister or curate of the parish; in every such case, every such offender, being thereunto warned or required by two justices of the peace or the coroner, shall upon his corporal oath before two justices of the peace or a coroner abjure the realm for ever; and thereupon shall depart out of this realm at such haven and port, and within such time, as shall be assigned and appointed by the said justices or coroner, unless he be letted or stayed by such lawful and reasonable means or causes, as by the common laws of this realm are permitted and allowed in cases of abjuration for felony; and in such cases of let or stay, then within such reasonable and convenient time after, as the common law requireth in case of abjuration for felony. §. 8.*

And every justice of the peace or coroner before whom such abjuration shall be made, shall cause the same presently to be entred of record before them, and certify the same to the next assizes. §. 9.

And if such offender shall refuse to make such abjuration, or after abjuration made shall not go to such haven and within such time as is before appointed, and from thence depart out of this realm, or after such departure shall return without the king's special licence; he shall be guilty of felony without benefit of clergy. §. 10.

Provided, that if any person so restrained shall be urged by process or be bound without fraud or covin to make appearance in any of the king's courts; or shall be required by three or more of the privy council, or by four or more of any commissioners to be in that behalf assigned by the king, to make appearance before such council or commissioners: in such case, he shall incur no forfeiture for travelling to make appearance accordingly, nor for his abode concerning the same, nor for convenient time for his return. §. 13.

And if any such person so restrained shall be bound or ought to yield his body to the sheriff, upon proclamation in that behalf without fraud or covin to be made; in such case he shall not incur any forfeiture for travelling for that purpose only, nor for convenient time for his return. §. 14.

Popery.

Provided also, that if any person that shall offend against this act, shall before he be thereof convicted, come to some parish church on some Sunday or other festival day, and there hear divine service, and at service time, before the sermon, or reading of the gospel, make publick and open submission and declaration of his conformity; he shall be discharged. Which submission shall be as followeth: I A. B. do humbly confess and acknowledge, that I have grievously offended god in contemning her majesty's good and lawful government and authority, by absenting my self from church, and from hearing divine service, contrary to the godly laws and statutes of this realm: And I am heartily sorry for the same, and do acknowledge and testify in my conscience, that the bishop or see of Rome hath not nor ought to have any power or authority over her majesty, or within any her majesty's realms or dominions: And I do promise and protest, without any dissimulation, or any colour or means of any dispensation, that from henceforth I will from time to time obey and perform her majesty's laws and statutes, in repairing to the church, and hearing divine service, and do my uttermost endeavour to maintain and defend the same. f. 15, 16.

And the minister or curate shall presently enter the same into a book to be kept in every parish for that purpose; and within ten days shall certify the same in writing to the bishop. f. 17.

And if any person shall relapse after his submission, he shall have no benefit by such his submission. f. 18.

And married women shall also be bound by this act, except only in the case of abjuration. f. 19.

Above five miles] It seems that the miles shall be computed according to the english manner, allowing 1760 yards to each mile; and that the same shall be reckoned not by streight lines, as a bird or arrow may fly, but according to the nearest and most usual way. 1 *Haw.* 25.

In cases of abjuration for felony] Anciently, if a man had committed felony, and did fly to a sanctuary, that is, to a church or church yard, before he was apprehended, he might not be taken from thence to be tried for his crime; but on confession thereof before the justices, or before the coroner, he was admitted to abjure the realm: but afterwards this privilege of *sanctuary*, by the 21 J. c. 28. was taken away. But the *abjuration*, where it is by statute specially appointed, as in the present case, doth still continue.

Abjuration] The form whereof, according to the ancient books, is thus: *This bear you, Sir coroner, that I A. O. of — in the county of — am a popish recusant, and in contempt of the laws and statutes of England, I have and do refuse to come to their church: I do therefore, according to the intent and meaning of the statute made in the 35th year of queen Elizabeth, abjure the realm of England. And I shall haste me towards the port of P. which you have given and assigned to me, and that I shall not go out of the highway leading thither, nor return back again; and if I do, I will that I be taken as a felon of the king: And that at P. I will diligently seek for passage, and I will tarry there but one flood and ebb, if I can have passage; and*

unless

unless I can have it in such space, I will go every day into the sea up to my knees, assaying to pass over. So help me god and his doom. Stam. 116. Min. b. 1. Offic. Cor. 49.

3. And by the 3 J. c. 5. f. 7. The king, or three of the privy council in writing under their hands, may give licence to every such recusant to go and travel out of the compass of five miles, for such time as in the said licence shall be contained, for their travelling attending and returning, and without any other cause to be expressed within the said licence: And if any person so confined shall have necessary occasion or business to go and travel out of the compass of the said five miles, then upon licence in writing in that behalf to be gotten, under the hands and seals of four justices of the peace of the same county division or place, next adjoining to the place of abode of such recusant, with the privity and assent in writing of the bishop of the diocese, or of the lieutenant or a deputy lieutenant of the county residing within the said county or liberty, under their hands and seals (in which licence shall be specified both the particular cause of the licence, and the time how long the party shall be absent in travelling attending and returning); it shall be lawful for such person to go and travel about such his necessary business for such time only as shall be comprised in the said licence, the party so licensed first making oath before the said four justices or any of them, that he hath truly informed them of the cause of his journey, and that he shall not make any causeless stays. And every person so confined who shall go above five miles from the place to which he is confined, not having such licence, and not having taken such oath, shall suffer as by the 35 El. c. 2.

L. 11 J. Peter Maxfield was indicted, that he being a convicted recusant departed above five miles from his abode in Walswood in the county of Stafford contrary to the statute. The defendant pleaded, that he informed Ralph Sneed, Walter Bagnal, and two other justices of the peace of the county of Stafford (the said Walter being also a deputy lieutenant there), that he had urgent occasions to go to London, about business concerning his estate, and made oath before them that it was true; whereupon they by writing under their seals gave licence unto him to go to London, or to other places, as his business required, for six months; by virtue whereof he went; and so justifies. And it was thereupon demurred: 1. Because the statute is, that four justices, with the assent of a lieutenant in writing, or one deputy lieutenant in writing, may give licence; for it ought to be by four justices besides the deputy lieutenant: And all the court were of that opinion; for the statute appointing precisely the number of the justices, with the assent as aforesaid, it ought to be exactly pursued; and it is not sufficient, that a deputy lieutenant be one of the four. 2. The licence is not good, because it is not pleaded to be under their hands; and it is not sufficient to plead it to be under their seals: Also the licence ought to shew the particular cause of the licence, and not in such general manner, for urgent causes. Wherefore rule was given, that if cause were not shewn, judgment should be entered for the king. Cro. Ja. 352.

XXXV. *Shall be disabled as to law, physick, and offices.*

By the 3 J. c. 5. No recusant convict shall practise the common law of this realm as a counsellor clerk attorney or solicitor, nor shall practise the civil law as advocate or proctor; nor practise physick, nor exercise the trade of an apothecary; nor shall be judge minister clerk or steward of or in any court, or keep any court, nor shall be register or town clerk, or other minister or officer in any court; nor shall bear any office or charge, as captain, lieutenant, corporal, serjeant, ancient-bearer, or other office in camp, troop, band or company of soldiers; nor shall be captain master or governor or bear any office of charge of or in any ship castle or fortress of the king; but shall be utterly disabled for the same: and every person offending herein shall also forfeit 100*l*. half to the king, and half to him that shall sue in any of the king's courts of record. *l*. 8.

And no popish recusant convict, or having a wife being a popish recusant convict, shall exercise any publick office or charge in the commonwealth; but shall be utterly disabled to exercise the same by himself or by his deputy: Except such husband himself, and his children which shall be above the age of nine years abiding with him, and his servants in household, shall once a month, not having any reasonable excuse, to the contrary, repair to some church or chapel usual for divine service, and there hear divine service; and the said husband, and such his children and servants as are of meet age receive the sacrament of the lord's supper, at such times as are limited by the laws of this realm, and do bring up his said children in true religion. *l*. 9.

XXXVI. *Shall not be executors, administrators, or guardians.*

By the 3 J. c. 5. A recusant convict shall be disabled to be executor or administrator by force of any testament or letters of administration; nor shall have the custody of any child as guardian in chivalry, guardian in socage, or guardian in nurture of any lands freehold or copyhold. *l*. 22.

And the next of kin of such child to whom the lands cannot lawfully descend, who shall usually resort to some church or chapel and there hear divine service, and receive the sacrament thrice in the year next before, shall have the custody and education of such child and of his lands holden in knights service, till the full age of the said ward of twenty one years; and of his lands holden in socage, as a guardian in socage; and of his lands holden by copy of court roll of any manor, so long as the custom of the said manor shall allow the same: and shall yield an account of the profits of the same to the said ward. *l*. 23.

And if any of the wards of the king or of any other shall be granted or sold to any popish recusant convict, such grant or sale shall be void. *l*. 24.

XXXVII. *Shall*

XXXVII. Shall not inherit or take by descent, devise, or purchase.

By the 11 & 12 W. c. 4. If any person educated in the popish religion or professing the same, shall not within six months after he shall attain the age of eighteen years, take the oaths of allegiance and supremacy and subscribe the declaration of the 30 C. 2. in the chancery or king's bench or quarter sessions where he shall reside; he shall in respect of himself (but not of his heirs) be disabled to inherit or take any lands by descent devise or limitation, in possession reversion or remainder; and during his life, or till he shall take the said oaths and subscribe the declaration, his next of kin who shall be a protestant shall enjoy the same without being accountable except for waste, for which he shall pay to the party disabled treble damages: and every papist or person professing the popish religion shall be disabled to purchase, in his own name, or in the name of any other to his use or in trust for him any manors, lands profits out of lands, tenements, rents, terms, or hereditaments; and all estates terms and any other interests or profits out of lands, to be made suffered or done for the use of such person or upon any trust or confidence mediately or immediately for the benefit or relief of any such person, shall be void. s. 4.

Shall not within 6 months after he shall attain the age of 18 years] If an infant is so young, as at the time of the accruing of the title (be it by devise or limitation) by reason of his tender years he is incapable of embracing any religion; in such case he may take within this act: but he must take care to conform before the age of 18 years and 6 months; otherwise he forfeits to the next protestant heir. 2 P. Will. 3.

Disabled to purchase] A papist tenant in tail suffers a recovery to the use of himself in fee, in order to make a marriage settlement; this is not a purchase within this statute. Str. 267. Mr. Ratcliffe's case, upon an appeal to the lords delegates from the judgment of the commissioners for forfeited estates.

Any manors, lands, &c.] But he may take personal estate, by the statute of distribution. 3 Peere Will. 40.

XXXVIII. Inrolling deeds and wills of papists.

1. By the 3 G. c. 18. No manors or lands or any interest therein, or rents or profit therout, shall pass alter or change from any papist or person professing the popish religion, by any deed or will, except such deed within six months after date, and such will within six months after the death of the testator, be inrolled in one of the king's courts of record at Westminster, or within the county wherein the manors and lands do lie, by the custos rotulorum and two justices of the peace and the clerk of the peace, or two of them, whereof the clerk of the peace to be one. s. 6.

2. But by the 10 G. c. 4. Leases of lands made by papists or persons professing the popish religion, to any protestant, whereon the full yearly value or the ancient or most accustomed yearly rent or more shall be reserved, shall be good without inrolling. s. 19.

3. And

3. And by the 2 G. 3. c. 26. Such deeds and wills shall be good, if they be inrolled before Dec. 25, 1762; if advantage hath not been taken of the default, before Dec. 25, 1761. And there is generally the like clause of indemnity in some act of parliament every two or three years.

And by the same statute, No purchase made for full and valuable consideration of any manors messuages or lands or of any interest therein, by any protestant, and merely and only for the benefit of protestants, shall be impeached or avoided by reason that any deed or will thro' which the title thereto is derived hath not been inrolled; so as no advantage was taken of the want of inrollment thereof before such purchase was made, and so as no decree or judgment hath been obtained for want of the inrollment of such deeds or wills.

Provided, that nothing herein shall be construed to extend, to make good any grant, lease, or mortgage, of the advowson, or right of presentation, collation, nomination, or donation, of and to any benefice, prebend, or ecclesiastical living, school, hospital, or donative, or any avoidance thereof, made by any papist or person professing the popish religion, in trust, directly or indirectly, mediately or immediately, by or for any such papist or person professing the popish religion, whether such trust hath been declared by writing or not.

XXXIX. Registering estates of papists.

1. By the 1 G. 1. c. 55. Every person having any estate or interest in any lands, being a popish recusant or papist or educated in the popish religion or whose parent or parents shall be a papist or papists or who shall use or profess the popish religion, shall within six months after he shall attain to the age of twenty one years take the oaths of the 1 G. 1. c. 13. and repeat and subscribe the declaration against popery of the 30 C. 2. in one of the courts at Westminster or at the sessions of the peace where such lands or some part thereof shall lie, between the hours of nine and twelve in the forenoon; or in default thereof, shall within six months next after the time appointed for him to take the oaths, and so from time to time within six months after he or any trustee for him shall come into the possession or perception of the rents or profits of any other lands, register or procure to be registered his name and all such lands, in what parish township or place the same do lie, and who are the possessors thereof, and what estate or interest he has in the same, and the yearly rent if the same shall be lett; and if the same be lett upon lease, then by whom such lease was made, what yearly or other rent is reserved thereupon, and what fine or sum of money was paid for such lease, in case the same was made by himself or any person in trust for him or that he was party or privy thereunto; and the time and day of the month and year when such entry shall be made,——in a parchment book or roll which shall be kept by the clerk of the peace. §. 1.

And every such person shall take care that his name be, within the said six months allowed for making such registry, subscribed to such registry in the presence of two justices in open sessions, either by himself, or by his attorney thereunto lawfully authorized by warrant of attorney under his hand and seal executed by him in the presence of two witnesses, who shall make proof of such execution upon their oaths at the sessions where such name shall be subscribed or registered.

gistry produced; and two justices then present shall subscribe their names to such entry as witnesses that the same was duly made, and in default thereof each of the said justices then present shall forfeit 20*l* to the king. §. 1.

And the clerk of the peace shall keep parchment books or rolls at some notorious place within his division, and shall by himself or his lawful deputy enter therein the christian and surnames of every such person who shall come in person and desire to be registred, or shall send any writing under his hand to him or his deputy, desiring him to register his name; and shall also register the estate in lands of every such person, in such manner and in such words as he shall by any writing signed by him desire: Provided that such person pay the fees hereby appointed for the same, and that he apply to the said clerk of the peace or his deputy to enter such registry, and deliver to him in writing the words he desires to have so registred or entred, ten days before the sessions where the entries are to be subscribed. And such clerk of the peace or his deputy shall enter such persons names and registry of their estates before the next sessions after such delivery, in the said books or rolls; and shall carry the said books and rolls in which such entries shall be so made, to the next and every other sessions of the peace, until the time of such subscribing shall be expired. And such clerk of the peace shall also keep alphabetical tables of the surnames of all such persons whose names and estates shall be registred, and of the parishes and townships where the lands so registred lie, with reference to the place in the books or rolls where such names and lands shall be registred; and shall also carefully keep all such warrants of attorney as shall be so proved as aforesaid upon a file, together with such books and rolls; and shall likewise enter such warrants of attorney upon record; and shall have for such registry and entry on record 3*d* for every 200 words which such registry and entry on record shall contain; and shall have 4*d* for every search that shall be made for the name or estate of any person; and shall make search on the request of any person who shall pay such fees, and shall permit such person to inspect the said tables books and rolls and such letters of attorney as shall be so filed; and shall give copies of such registries subscribed by himself or his lawful deputy, to every person who shall desire the same and tender him the fees hereby appointed for the same; and shall suffer such persons who shall request him so to do, to examine the same with the roll or book, and for so doing shall have 3*d* for every 200 words contained in every such copy. §. 1.

And if any clerk of the peace shall neglect or refuse to do any the things hereby appointed, he shall forfeit his office. §. 1.

And if any such person hereby required to take and subscribe such oaths and repeat and subscribe such declaration as aforesaid, or in default thereof to register or cause to be registred his name and estate as aforesaid, shall not either take and subscribe such oaths and repeat and subscribe such declaration in manner aforesaid, or register his name and estate as aforesaid, and also subscribe his name to such registry or procure the same to be subscribed by such his attorney as aforesaid, within the time limited for the doing thereof, or shall not register the same truly; he shall forfeit the fee simple and inheritance of all such lands not registred or fraudulently registred whereof he or any person in trust for him was seized in fee simple at the time of such default or fraud in registering, and the full value of the inheritance of all such lands not registred or fraudulently registred whereof

he or some person in trust for him was not seized in fee simple at the time of such default or fraud as aforesaid; two third parts to the king, and the other third part to such person being a protestant who shall sue for the same at the common law in any of the courts at Westminster or in the chancery: and the person so suing shall be intitled in the court of chancery to demand all such discoveries as he might do if he were a purchaser for valuable consideration, and to demand a true discovery from all persons of all such incumbrances and titles which any way affect the same, and of all trusts relating thereto; to which bill no plea of demurrer shall be allowed, but the defendant shall sufficiently answer the same at large: and also the person suing for the same may bring an ejectment on his own demise, and give this act and the special matter in evidence; and if it shall appear upon trial of such ejectment, that the estate sued for is the estate of the person so neglecting to register or fraudulently registering, and the defendant shall not make it appear that he took the said oaths and repeated and subscribed the said declaration in manner aforesaid, or otherwise that he registered his name and the estate so sued for, a verdict shall be given for the lessor of the plaintiff in such ejectment, and judgment shall be thereupon had as is usual upon verdicts in ejectments, and the lessor of the plaintiff shall have costs of suit as is usual when judgment in ejectment is recovered by or given for the lessor of the plaintiff; and by such judgment two third parts of the lands so recovered shall be vested in the king, and the other third part in the person who shall be lessor of the plaintiff in the said ejectment. §. 1.

But in case such person so making default or committing any fraud in registering as aforesaid, after such default or fraud committed, and before he be convicted or any ejectment or suit brought for such forfeited lands, shall bona fide for a just and valuable consideration convey over grant lease or incumber any such lands omitted or fraudulently registered as aforesaid; the person so purchasing or having such grant lease or incumbrance, not knowing at the time of such purchase or incumbrance made the said offender to be a person within the description of this act, shall not be prejudiced hereby, but in such case the offender shall forfeit the value of the inheritance to be distributed and recovered in manner aforesaid. §. 3.

Also this shall not extend to compel any person to register or procure to be registered any lands, until he or some other person as trustee for him hath been actually seized, and have notice thereof, or possessed, or in the receipt of the rents or profits of the same for six months. §. 4.

And this shall not extend to compel any person to register any lands, whereof he shall be only farmer or tenant at rack rent, or only shall hold by lease whereupon two thirds of the full yearly value or more shall be reserved. §. 5.

Also this shall not extend to defeat or prejudice any protestant, or other creditor, who bona fide shall have any charge or incumbrance upon any real estate hereby directed to be registered; but then in case of such charge or incumbrance, the person so making default or committing any fraud in registering as aforesaid, shall forfeit the value of such charge and incumbrance, one third to him who shall by virtue of this act sue for and recover the lands so forfeited subject to such charge and incumbrance or any part thereof in proportion to the part so by him recovered, and two thirds to the king. §. 6.

2. And

2. And by the 3 G. c. 18. No action for any penalty or forfeiture on this or the former act, for wilfully neglecting or refusing to register or for committing fraud in such registry, shall be commenced after two years after the offence committed. f. 2.

And where any manors demesne or other lands or entire farms do lie in more counties than one, the registering thereof, in the county only where the manor house or the house to the said farm or lands do lie, and not in several counties, taking notice thereof in the said registry, that the same do extend to such other county, ——— shall be a sufficient registering of such entire manors farms or lands. f. 3.

And no sale for a full and valuable consideration of any manors messuages or lands, or of any interest therein, by any person being reputed owner or in the possession or receipt of the rents and profits thereof, made to and for any protestant purchaser, and merely and only for the benefit of protestants shall be avoided or impeached by reason of any of the disabilities or incapacities in the 11 & 12 W. c. 4. or 1 J. c. 4. or other acts contained, and incurred by any person joining in such sale, or by any other person from or thro' whom the title or any interest therein shall be derived; unless before such sale, the person intitled to take advantage of such disability or incapacity shall have recovered the said manors messuages or lands, or given notice of his claim and title to such purchaser; or, before the contract for such sale, shall have claimed the said manors messuages or lands, by reason of such disability or incapacity, and have entred such claim in open court at the general sessions of the peace where the same do lie, and bona fide and with due diligence pursued his remedy in a proper course of justice for the recovery thereof. f. 4.

XL. Papists to pay double taxes.

By the yearly land tax acts, papists and reputed papists, being of eighteen years of age, who shall not have taken the oaths of allegiance and supremacy, shall pay double land tax.

XLI. Lands given to superstitious uses.

By the 1 G. ft. 2. c. 50. All manors lands tenements rents tithes pensions portions annuities and all other hereditaments whatsoever, and all mortgages securities sum of money goods chattels and estates, which have been given granted devised bequeathed or settled upon trust, or to the intent that the same or the profits or proceed thereof shall be applied to any abbey priory convent nunnery college of jesuits seminary or school for the education of youth in the Romish religion in Great Britain or elsewhere, or to any other popish or superstitious uses, ——— shall be forfeited to the king for the use of the publick. f. 24.

And the commissioners of the forfeited estates by that act had power to inquire and inform themselves of all such. f. 25.

XLII. *Presentment of papists to the courts spiritual and temporal.*

1. *Can. 110.* If the churchwardens or questmen or assistants shall know any man within their parish or elsewhere, that is a fautor of any usurped or foreign power by the laws of this realm justly rejected and taken away, or a defender of popish and erroneous doctrines; they shall detect and present the same to the bishop of the diocese or ordinary of the place, to be censured and punished according to such ecclesiastical laws as are prescribed in that behalf.

2. *Can. 114.* Every parson vicar or curate shall carefully inform themselves every year, how many popish recusants men women and children above the age of thirteen years, and how many being popishly given (who tho' they come to the church, yet do refuse to receive the communion) are inhabitants or make their abode either as sojourners or common guests in any of their several parishes, and shall set down their true names in writing (if they can learn them) or otherwise such names as for the time they carry, distinguishing the absolute recusants from half recusants; and the same so far as they know or believe, so distinguished and set down under their hands, shall truly present to their ordinaries, under pain of suspension, before the feast of St. John Baptist. And all such ordinaries chancellors commissaries archdeacons officials and all other ecclesiastical officers to whom the said presentments shall be exhibited, shall likewise within one month after the receipt of the same, under pain of suspension by the bishop from the execution of their offices for the space of half a year (as often as they shall offend therein), deliver them or cause to be delivered to the bishop respectively; who shall also exhibit them to the archbishop within six weeks; and the archbishop to his majesty within other six weeks after he hath received the said presentments.

3. And by the statute of the 3 J. c. 4. *The churchwardens and constables of every town parish or chapel, or one of them, or if there be none such, then the chief constable of the hundred where such town parish or chapel shall be, as well in places exempt as not exempt, shall once a year present the monthly absence from church of all popish recusants; and shall present the names of their children being of the age of nine years and upwards, abiding with their parents, and as near as they can the age of every of the said children; as all the names of the servants of such recusants;——at the general quarter sessions. s. 4.*

Which presentments shall be recorded by the clerk of the peace, or town clerk, without fee. And in default of such presentment to be made, the churchwardens constables or high constables shall forfeit 20s; and in default of such recording, the clerk of the peace or town clerk shall forfeit 40s: To be recovered in the king's bench, assizes, or sessions. s. 5, 36.

And upon every presentment of such monthly absence, whereupon the party shall after be indicted and convicted (not being for the same absence before presented) the churchwardens constables or high constables making such presentment, shall have a reward of 40s, to be levied out of the recusant's goods and estate,

in such manner and form as the justices shall by their warrant then and there order and appoint. s. 6.

XLIII. Information against papists not restrained to the proper county.

The act of the 21 J. c. 4. for laying informations in the proper county, shall not extend to any information suit or action grounded upon any law or statute made against popish recusants, or against those that shall not frequent the church and hear divine service; but such offence may be laid or alleged to be in any county at the pleasure of the informer, any thing in the said act to the contrary notwithstanding. s. 5.

XLIV. Peers how to be tried in cases of recusancy.

It is generally provided in the several acts, that peers in cases of recusancy shall be tried by their peers.

XLV. Papists conforming.

1. By the 1 J. c. 4. If any recusant shall submit or reform himself and become obedient to the laws of the church, and repair to church, and continue there during the time of divine service and sermons; he shall be discharged. s. 2.

2. By the 3 J. c. 4. Every popish recusant convicted, who shall conform himself and repair to church, shall within the first year after he shall so conform himself, and after the said first year shall once in every year following at the least, receive the sacrament of the lord's supper, in the church of the parish where he shall most usually abide. s. 2.

And if there be no such parish church, then in the church next adjoining: on pain that for such not receiving he shall forfeit for the first year 20l, for the second year 40l, and for every year after 60l, until he shall have received the sacrament, as aforesaid: And if after he shall have received the sacrament, he shall afterwards at any time offend in not receiving the same by the space of one year, he shall for every such offence forfeit 60l. The one half of all which forfeitures shall be to the king, and the other half to him that will sue in any court of record at Westminster, or at the assizes, or general quarter sessions. s. 3.

3. And by the 11 G. 2. c. 17. Every person being reputed owner or in possession or receipt of the rents and profits of any manors messuages or lands, or of any interest therein, who having been or reputed to be a papist or educated in the popish religion, shall conform to and profess the protestant religion, and shall take the oaths of allegiance supremacy and abjuration and repeat and subscribe the declaration of the 30 C. 2. in the court of chancery, king's bench, or quarter sessions of the county where he shall reside (all which shall be recorded in one of his majesty's courts of record at Westminster or such quarter sessions as aforesaid); and every person being a protestant, claiming under such person so conforming, for his own benefit or for the benefit of any other protestant

Popery.

protestant and not for the benefit of any papist, ——— shall hold possess and enjoy all such manors messuages and lands discharged from all disabilities and incapacities incurred by such person so reputed owner or in possession or receipt of the rents and profits as aforesaid, or by any other person by from or thro' whom the title to such manors messuages or lands or any interest therein shall be derived, for such estate or interest as he would have had if no such disability or incapacity had been incurred: unless the person intitled to take advantage of such disability incapacity or defect of title shall bona fide recover such manors messuages or lands, by judgment or decree in some action or suit to be commenced six kalendar months before the making of such record, and to be prosecuted with due diligence. s. 1.

But this shall not prejudice the right of any person intitled to take advantage of such disability or incapacity, who shall have, precedent to the making of such record, been in quiet possession of any such manors messuages or lands by the space of two kalendar months. s. 2.

And if any such person so conforming shall afterwards return to or again profess the popish religion, he shall for ever afterwards be disabled and incapable of having any benefit of this act, and shall from thenceforth be liable to the same disabilities incapacities and forfeitures as if he had not taken the said oaths and subscribed the declaration. s. 3.

Also, this shall not extend to prejudice the right of any person intitled to any remainder or reversion in any such manors messuages or lands, in case he shall pursue his right by some action or suit to be commenced within twelve kalendar months next after the precedent estate on which such remainder or reversion depends and is expectant shall be determined, and shall prosecute such action or suit with due diligence. s. 4.

In the year 1714, the convocation drew up a form of receiving converts from popery: which is printed in *Wilk. Conc.* V. 4. p. 660.

XLVI. Saving of the ecclesiastical jurisdiction.

It is generally provided by the several principal statutes above rehearsed, that nothing therein shall take away or abridge the authority or jurisdiction of ecclesiastical censures; but the archbishops, bishops, and other ecclesiastical judges may proceed as before the making thereof.

Portion of tithes See **Tithes.**

Præmonstratenses. See **Monasteries.**

Præmunire. See **Courts.**

Præstation. See **Pension.**

Preaching. See **Publick worship.**

Prebendary.

THE law concerning prebendaries, canons, and other members of the chapter in cathedral and collegiate churches, falleth in under the title **Deans and Chapters.**

Prerogative court.

THE prerogative court of the archbishop, is that court wherein all testaments are proved, and all administrations granted, where the party dying within the province hath bona notabilia in some other diocese than where he dieth; and is so called from the archbishop's having a *prerogative* throughout his whole province for the said purposes.

⁴ *Inst.* 335.

From this court the appeal lieth to the king in chancery. *id.*

Presentation.

PRESENTATION, or collation, to a living, is treated of under the title **Benefice.**

Presentation to popish livings, is treated of under the title **Popery.**

Priest. See **Ordination.**

Primate. See **Bishops.**

Prior. See **Monasteries.**

Private chapels. See **Chapel.**

Privileges.

Privileges and restraints of the clergy.

Not bound to
serve in a tem-
poral office.

1. **T**HE common law, to the intent that ecclesiastical persons might the better discharge their duty in celebration of divine service, and not to be intangled with temporal business, hath provided that they shall not be bound to serve in any temporal office. *1 Inst. 96.*

And altho' a man holdeth lands or tenements, by reason whereof he ought to serve in a temporal office, yet if this man be made an ecclesiastical person within holy orders, he ought not to be elected to any such office; and if he be, he may have the king's writ for his discharge. *2 Inst. 3.*

And this, altho' it be an office which he may execute by deputy: Thus, in the case of the vicar of *Dartford*, *H. 12 G. 2.* the court granted to him a writ of privilege, against serving the office of expeditor to the commissioners of sewers; tho' it was insisted, that this was an office, which might be executed by deputy. *Str. 1107.*

Not restrained
from serving
in a temporal
office.

2. The popish foreign canon law forbids secular offices and employments to persons in holy orders. So do the following constitutions:

Othob. No clergyman shall be an advocate in the secular court in a cause of blood, or in any other cause but such as are allowed by law. And if any shall do otherwise, if it be in a cause of blood, he shall be ipso facto suspended from his office; and if in any other cause, he shall be punished by his diocesan according to his discretion. And in causes of blood which shall extend to life or member, we do strictly injoin, that no clergyman presume to be a judge or an assessor; and he who shall act contrary hereunto, besides the suspension from his office which he shall ipso facto incur, shall be otherwise punished according to the discretion of his superior: From which sentence of suspension he shall by no means be absolved by his diocesan, until he shall have made competent satisfaction. *Aikon 91.*

And, more particularly, by another constitution of the same legate: Whereas it is unbecoming for clergymen employed in heavenly offices, to minister in secular affairs; we think it fordid and base, that certain clerks greedily pursuing earthly gain and temporal jurisdictions, do receive secular jurisdictions from laymen, so as to be named justices, and to become ministers of justice, which they cannot administer without injury to the canonical dispositions and to the clerical order: We desiring to extirpate this horrid vice, do strictly injoin all rectors of churches and perpetual vicars and all others whatsoever constituted in the order of priesthood, that they receive no secular jurisdiction from a secular person, or presume to exercise the same; and if they do, they shall relinquish the same within the space of two months, and never resume it; and whosoever shall attempt any thing contrary to the premisses, shall be ipso facto suspended from his office and benefice; and if he shall intrude into his office or benefice during such suspension, he shall not escape canonical vengeance, which

which shall not be relaxed until he shall have made satisfaction at the discretion of his diocesan, and taken an oath that he will not do the like again. Saving the privileges of our lord the king in this behalf.

Atton 91.

Which saving (Mr Johnson says) intirely defeated the constitution. And in the former constitution there is also a saving, for such causes as are allowed by law. Johnf. Othob.

But if those savings had not been expressed; yet it is certain, that the constitutions could not have altered the law of the land in this respect. And it is well known, that the kings of England in all ages have asserted a right to employ what subjects they pleased, of the clergy as well as laity, in any post of civil government; and in fact, very many clergymen have been chancellors, treasurers, and even chief justices of the king's bench, and consequently must have sat as judges in cases of life and death.

And by the statute of Articuli cleri, 9 Ed. 2. st. 1. c. 8. It is complained as followeth: *The barons of the king's exchequer claiming by their privilege, that they ought to make answer to no complainant out of the same place, extend the same privilege unto clerks abiding there, called to orders or unto residence, and inhibit ordinaries that by no means, or for any cause, so long as they be in the exchequer, or in the king's service, they shall not call them to judgment.* Unto which it is answered: *It pleaseth our lord the king, that such clerks as attend in his service, if they offend, shall be corrected by their ordinaries, like as other; but so long as they are occupied about the exchequer, they shall not be bound to keep residence in their churches.* This is added of new by the council: *The king and his ancestors, since time out of mind have used, that clerks which are employed in his service, during such time as they are in service, shall not be compelled to keep residence in their benefices; and such things as be thought necessary for the king and commonwealth, ought not to be said to be prejudicial to the liberty of the church.*

So long as they are occupied about the exchequer] And the court of exchequer may grant a prohibition to the ordinary, for any that ought to have the privilege of the exchequer, where the court may give the party remedy, or where a suit dependeth in the court of exchequer for the same cause; or where the king's service, which is the cause of the privilege, is hindered by the suit before the ordinary: as for non-residence, during that time that he gave his necessary attendance in the exchequer for the king's service. 2 Inst. 624.

Added of new by the king's council] That is, by the common council of the realm, as it is termed in original writs, and in other legal records, and so it is taken in other acts of parliaments, and in the preamble to these same articuli cleri. 2 Inst. 624.

That clerks which are employed in his service]. This branch is general, and not limited (as the former is) to the privilege of the exchequer; but extendeth to any other service of the king for the commonwealth: as if he be employed as an ambassador into any foreign nation, or the like service.

Privileges and restraints of the clergy.

vice for the king, which is (as it is here said) for the commonwealth, which ever must be preferred before the private. 2 Inst. 624.

Not bound to
serve in war.

3. Ecclesiastical persons have this privilege, that they ought not in person to serve in war. 2 Inst. 3.

Not bound to
appear at the
tourn or leet.

4. By the statute of 52 H. 3. c. 10. *For the tourns of sheriffs, it is provided, that archbishops, bishops, nor any religious men, or women, shall not need to come thither, except their appearance be specially required thereat for some other cause.*

The tourns of sheriffs] Nor consequently are they bound to appear at the leet, or view of frankpledge. 2 Inst. 4.

Nor any religious men] Men of religion, in the proper sense, are taken for those that are regulars, as being professed in some of the religious orders, as abbots, priors, and the like; but ecclesiastical persons that are seculars, that is, who do not live under the rules of any of the religious orders, as bishops, deans, archdeacons, prebends, parsons, vicars, and such like, are also within this act. 2 Inst. 121.

Shall not need to come thither] That is, they are not compellable to come, but left to their own liberty. And if any man be grieved in any thing contrary to the purview of this statute, he shall have an action grounded upon the statute, for his remedy and relief therein. 2 Inst. 121, 122.

Except their appearance be specially required thereat for some other cause] As to be a witness, or the like. 2 Inst. 121.

Not to be
arrested in
attending di-
vine service.

5. By the 50 Ed. 3. c. 5. it is enacted as follows: *Because that complaint is made by the clergy, that as well divers priests, bearing the sacrament to sick people, and their clerks with them, as divers other persons of holy church, whilst they attend to divine services in churches, church-yards, and other places dedicate to god, be sundry times taken and arrested by authority royal, and commandment of other temporal lords, in offence of god, and of the liberties of holy church, and in disturbance of divine services aforesaid; the king granteth and defendeth, upon grievous forfeiture, that none do the same from henceforth: so that collusion or feigned cause be not found in any of the said persons of holy church in this behalf.*

And by the 1 R. 2. c. 15. it is thus further enacted: *Because that prelates do complain themselves, that as well beneficed people of holy church, as other, be arrested and drawn out as well of cathedral churches, as of other churches and their churchyards, and sometimes whilst they be intended to divine services, and also in other places, altho' they be bearing the body of our lord Jesus Christ to sick persons, and so arrested and drawn out, be bound and brought to prison, against the liberty of holy church; it is ordained, that if any minister of the king or other, do arrest any person of holy church by such manner, and thereof be duly convicted, he shall have imprisonment, and then be ransomed at the king's will, and make gree to the parties so arrested: provided, that the said people of holy church shall not hold them within the churches or sanctuaries by fraud or collusion in any manner.*

And

Privileges and restraints of the clergy.

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And their clerks with them] By this it appears, that the clerk who is assistant may have this privilege. *Degge p. 1. c. 11.*

Whilst they attend to divine services] It hath been adjudged upon this, that in going, continuing, and returning, to celebrate divine service, the priest ought not to be arrested, nor any who aid him in it. *12 Co. 100.*

By authority royal] But this extendeth only to cases betwixt party and party, and not to cases wherein the publick peace is concerned, which are between the king and the party; and therefore a person may be apprehended going to or returning from divine service, by a warrant from a justice of the peace, it being for a breach of the peace, and for the king, and so in like cases. *Watf. ch. 34.*

Thus, in the case of *Pit* and *Webley*, *E. 11 J.* *Pit* had a warrant from a justice of the peace, and served it upon *Webley*, as he was coming from church from sermon, upon a week day. Whereupon *Webley* libelled against him in the spiritual court; and *Pit* moved for a prohibition, and framed the suggestion upon these statutes, which prohibit arrests in time of divine service, and in going and returning to and from the church. But it was said, that those statutes are where the matters are betwixt one common person and another, but not where it concerns the king and a common person, as here it did, this arrest being made at the king's suit. And to this opinion the court seemed to incline, and that there was just cause for a prohibition. But further day being given, the parties in the mean while agreed. *Cro. Ja. 321.*

Against the liberties of holy church] By which it appears, that these statutes are but an affirmation of the common law, and in maintenance of the liberties of holy church. *12 Co. 100.*

And thereof be duly convicted] The party grieved may have an action upon the statute: for when any thing is prohibited by an act, altho' the act doth not give an action, yet action lieth upon it. *12 Co. 100.*

And if an arrest be made contrary to these statutes, and the person arresting doth presently discharge the person arrested, upon pretence of ignorance, or the like; this will not excuse the contempt in making the arrest. *Watf. ch. 34.*

However, if such undue arrest be made, the arrest is good; so that if a rescous be made, and thereby any person killed, the killing is murder. *Watf. ch. 34.*

And Dr. Watson says, he that doth offend against the aforesaid statutes, may not only be fined in the temporal court, but also may be excommunicated by the ecclesiastical judge, and condemned in costs. *Watf. ch. 34.*

6. By the statute 13 Ed. 1. it. 4. it is thus enacted: *For laying violent hands on a clerk, it hath been granted, that it shall be tried in a spiritual court, when money is not demanded, but a thing done for punishment of sin. And hereof the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.* Laying violent hands on a clerk.

Privileges and restraints of the clergy.

And by the 9 Ed. 2. c. 3. *If any lay violent hands on a clerk, the amends for the peace broken shall be before the king, and for the excommunication before a prelate, that penance corporal may be enjoined; which if the offender will redeem of his own good will, by giving money to the prelate, or to the party grieved, it shall be required before the prelate, and the king's prohibition shall not lie.*

Lay violent hands] A prohibition having been granted, where a clerk libelled against another in the spiritual court, for that he beat him, or at leastwise assaulted him with a bill, and would have stricken him, and called him goose, and woodcock, and many such words; the court held, that the prohibition did well lie: for altho' for the *laying violent hands* on a clerk, the suit ought to be in the spiritual court, yet for an assault only, the suit ought to be at the common law. *Cro. El. 753.*

So also where a prohibition was granted to stay process in the spiritual court, against one who seeing an assault made upon his servant by a clerk, came in aid of his servant, and laid his hands peaceably upon the clerk; Gawdy chief justice held, that this case was out of these statutes, because the party had good cause to beat the clerk: and the prohibition stood. *Cro. El. 655.*

So also, if a clergyman be arrested by process of law, he cannot for this sue in the ecclesiastical court. *2 Inst. 492.*

The amends for the peace broken shall be before the king] If the clerk sue in court christian for damages for the battery, he is in case of *præmunire*; for in that case the ecclesiastical judge ought to proceed *ex officio*, only to correct the sin. *2 Inst. 492.*

And tho' he do not directly sue for such damages there; yet, if a man is excommunicate for laying violent hands on a clerk, and the spiritual court deny absolution till amends be made to the party for the battery; a prohibition will be granted. *Gibf. 9.*

And for the excommunication before a prelate] This is the known punishment assigned to that crime by the canon law; to which the practice of the church of England hath been conformable, both before and since the reformation. *Gibf. 9.*

It shall be required before the prelate, and the king's prohibition shall not lie] Or, in case the money for redeeming of penance is sued for in the spiritual court, and a prohibition is granted by the temporal; then a writ of consultation is provided for relief of the party. *Gibf. 9.*

7. He that is within orders hath a privilege, that albeit he have had the privilege of his clergy for a felony, he may have his clergy afterwards again, and so cannot a layman: And he that is within orders, and hath his clergy allowed, shall not be branded in the hand. And these privileges are given by act of parliament. *2 Inst. 637. 2 H. H. 389.*

And altho' a clergyman in orders shall not be burnt in the hand, yet after his discharge given by the court, he shall have the same privilege, as if he had been burnt in the hand; and therefore shall not be drawn in question

Shall have the benefit of clergy more than once.

question in the ecclesiastical court, to deprive him, or inflict any ecclesiastical censure upon him. 2 H. H. 389.

8. Such as be within orders of the ministry, or clergy, cannot be empannelled as jurors. *Lamb. Just.* 396.

Exempted from serving on juries.

9. It seems to be agreed, that a person in holy orders cannot be an approver; because it is a rule, that no member of the clergy can sue any appeal whatsoever, in a matter or cause of death. 2 Haw. 205.

Cannot be an approver.

10. A clergyman being an appellant, the defendant cannot wage his battel; but the clerk being appellant may counterplead the wager of battel, and compel the appellee to put himself upon his country. 2 Haw. 427.

May counterplead the wager of battle.

11. By the 9 H. 3. c. 14. *No man of the church shall be amerced after the quantity of his spiritual benefice, but after his lay-tenement, and after the quantity of his offence.*

Shall not be amerced after the quantity of his spiritual benefice.

Amerced] Here appeareth a privilege of the church, that if an ecclesiastical person be amerced (tho' amerciaments belong to the king) yet he shall not be amerced in respect of his ecclesiastical promotion or benefice, but in respect of his lay fee, and according to the quantity of his fault; which is to be affeered. 2 Inst. 29.

Benefice] Benefice is a large word, and is taken for any ecclesiastical promotion, or spiritual living whatsoever. 2 Inst. 29.

Lay-tenement] And if a spiritual person be amerced above the quantity of his lay-tenement, he shall have a writ to prohibit the levying of it. *Gibf.* 13.

12. By the 1 Ed. 3. ft. 2. c. 10. *Whereas archbishops, bishops, abbots, priors, abbesses, and prioresses have been sore grieved by the requests of the king and his progenitors, which have desired them by great threats, for their clerks and other servants, for great pensions, prebends, churches, and corodies, so that they could nothing give nor do to such as had done them service, nor to their friends, to their great charge and damage; the king granteth, that from henceforth he will no more such things desire, but where he ought.*

How far subject to pensions or services to the king.

But where he ought] For, of common right, the king, as founder of archbishopricks, bishopricks, and many religious houses, had a corrody, or a pension, in the several foundations; a corrody, for his valedets, who attend him; and a pension, for a chaplain, such as he should specially recommend, till the respective possessor should promote him to a competent benefice. *Gibf.* 16.

If any ecclesiastical person shall be in fear or doubt, that his goods or chattels or beasts, or the goods of his farmor, should be taken by the ministers of the king, for the business of the king, he may purchase a protection. 2 Inst. 4.

No demean or proper cart for the necessary use of any ecclesiastical person, ought to be taken for the king's carriage; but they are exempted by the ancient law of England from any such carriage: and this was an ancient privilege belonging to holy church. 2 Inst. 35.

Privileges and restraints of the clergy.

But there is no special exemption in the yearly mutiny acts, for clergymen, in respect of the soldiers carriages.

The sheriff cannot levy of his ecclesiastical goods.

13. If a person be bound in a recognizance in the chancery or other court, and he pay not the sum at the day; by the common law, if the person had nothing but ecclesiastical goods, the recognizee could not have had a *levari facias* to the sheriff to levy the same of these goods, but the writ ought to be directed to the bishop of the diocese to levy the same of his ecclesiastical goods. 2 *Inst.* 4.

In an action brought against a person, wherein a *capias* lieth (for example, an account) the sheriff returns that he is a *clergyman beneficed having no lay fee*, in which he may be summoned; in this case the plaintiff cannot have a *capias* to the sheriff to take the body of the person, but he shall have a writ to the bishop, to cause the person to come and appear. But if he had returned, that he is a *clergyman having no lay fee*, then is a *capias* to be granted to the sheriff; for that it appeared not by the return that he had a benefice, so as he might be warned by the bishop his diocesan; and no man can be exempt from justice. 2 *Inst.* 4.

M. 9 W. Mofely and Warburton. On a *fieri facias* against *Warburton*, a fellow of Winchester college, the sheriff returned, that he is a *clergyman beneficed having no lay fee*. Hereupon a *fieri facias* was issued to the bishop, to levy the same of his ecclesiastical goods. The bishop sent his mandate to the warden and fellows of the college, to sequester his salary. They answer, that they have not power to do it. The bishop moved the court to know, whether he might compel them by ecclesiastical censures. By Holt chief justice; if a prebendary hath a sole body, the bishop upon a *levari facias* of his ecclesiastical goods may sequester it; but if he hath but a body aggregate with the dean and chapter, he cannot sequester it. In this case, the profits of the fellowship are but casual dividends, in which before division *Warburton* hath no interest, so that they do not make an estate; and it seems in this case *Warburton* is not a clerk beneficed, and the bishop may return that he hath no ecclesiastical goods. *L. Ray.* 265. 1 *Salk.* 320.

Distresses not to be taken in the fees of the church.

14. *Articuli cleri*, 9 Ed. 2. ft. 1. c. 9. It is complained; *that the king's officers, as sheriffs and other, do enter into the fees of the church to take distresses, and sometimes they take the parson's beasts in the king's highway, where they have nothing but the land belonging to the church.* Answer: *The king's pleasure is, that from henceforth such distresses shall neither be taken in the king's highway, nor in the fees wherewith churches in times past have been endowed; nevertheless he willet distresses to be taken in possessions of the church newly purchased by ecclesiastical persons.*

Fees of the church] That is, lands belonging to the church. *Lind.* 268.

Parsons] Here parsons (rectores) be named but for example; for this law extendeth to other ecclesiastical persons. 2 *Inst.* 627.

From henceforth such distresses shall not be taken] Notwithstanding that the king's officers, as sheriffs and others, are mentioned in the complaining part, yet lord Coke says, this law bindeth not the king, when he

he is party, for any debt or duty due unto him, because the distress or other process for the king is not expressly named (in the enacting part), but distresses generally: And this appeareth, he says, by a book case (27 Aff. p. 66.); a prior brought a bill of trespass against the sheriff, for entering into his sanctuary, that is, within the circuit of the scite of his priory, and took away his beasts. The defendant said, that he was sheriff, and that the prior lost issues in the court of common pleas, and a writ issued to him to levy the issues, and that he entered into the sanctuary because he could not find a distress without. Whereupon the plaintiff demurred, and judgment was given against the plaintiff. Which proveth that the sheriff in that case could not have returned, upon the process to him directed, that he is a clerk beneficed having no lay fee. 2 Inst. 627. Nevertheless, the words are, that *such* distresses (quod distractiones *hujusmodi*) shall not be taken; which manifestly refer to the complaint preceding.

Shall neither be taken] And if they be taken, the party aggrieved may have a writ for his relief. *Gibf.* 15.

Have been endowed] This is to be taken in a large sense; for here the fees that they have by reason of their foundation, or by reason of their dotation or endowment, are included. 2 Inst. 627.

Endowed] The possessions of the church are the endowment of the church, and they are accounted as tenants in dower. 2 Inst. 627.

Possessions of the church newly purchased by ecclesiastical persons] Concerning tithes, tenths, and fifteenths granted by parliament to the king, the possessions of ecclesiastical persons, which they acquired since the 20 Ed. 1. either by purchase or act in law, as by others, &c. were chargeable thereunto: but those which they had at that time were not charged therewith. And the reason thereof was this: The pope (after the example of the high priest among the Jews, who had of the Levites the tenth part of the tithe) claimed by pretext thereof a yearly tenth part of the value of all ecclesiastical livings. This portion or tribute was by ordinance yielded to the pope in 20 Ed. 1. and a valuation then made of the ecclesiastical livings within this realm, to the end the pope might know, and be answered of that yearly revenue, so as the ecclesiastical livings chargeable with that tenth (which was called spiritual) to the pope, were not chargeable with the temporal tenths or fifteenths granted to the king in parliament, lest they should be doubly charged: but their possessions acquired after that taxation were liable to the temporal tenths or fifteenths, because they were not charged to the other. 2 Inst. 627.

Newly purchased] In which the temporal lords had a right of distraining; which right they ought not to lose, by the possessions coming into the hands of ecclesiastical persons. For where any burden real lieth upon any land or place, the thing it self passeth with its burden. *Lindw.* 268.

Purchased] Either to their own use, or to the use of the church. *Lindw.* 268.

Privileges and restraints of the clergy.

Shall not be
taken on a
statute mer-
chant or staple.

Free from
tolls and other
charges by the
common law.

15. If any ecclesiastical person knowledge a statute merchant or statute staple, or a recognizance in the nature of a statute staple; his body shall not be taken by force of any process thereupon. 2 *Inst.* 4.

16. Amongst the Saxons, the lands of the clergy were charged to castles, bridges, and expeditions. *Wake's State of the Ch.* 2.

But after the introduction of the Romish canon law, they obtained exemptions.

And lord Coke says, that ecclesiastical persons ought to be quit and discharged of tolls and customs, avirage, pontage, paviage, and the like, for their ecclesiastical goods; and if they be molested therefore, they may have a writ for their discharge. 2 *Inst.* 3.

Which writ they may have out of the chancery made of course without petition or motion, directed to the party that distrains or disturbs them for any of these things, commanding them to desist; and if such writ be not obeyed, the curfitor of course will make out an alias and pluries; and if none of these will be obeyed, an attachment to arrest the party, and detain him till he obey. *Degge p. 1. c. 11.*

But this and the like is always to be understood, with this exception, viz. provided that no act of parliament hath ordered otherwise.

Not freed
from general
charges by act
of parliament.

17. Anciently, indeed, it was held, that clergymen are not to be burdened in the general charges with the laity of this realm; neither to be troubled or incumbered, unless they be especially named and expressly charged by some statute. *God. Rep.* 194.

Thus Dr Godolphin observes, that the statute of *bue and cry* charges the *inhabitants and residents*; but it hath never been taken, says he, that parsons and vicars are included, or shall be contributory in robberies. In the same statute are *watchings*; yet the clergy thereby are never charged. The statute for *highways*, charges every *householder*; yet this hath never been taken by usage to charge the clergy. Also, the charge of *gaols*; the act says all *residents* shall pay: yet have the clergy never been charged. Thus, where the *bridge act* says, *all inhabitants* shall be assessed; it must mean all such only as are chargeable to pontage. *God. Rep.* 194, 5.

But now the contrary doctrine prevails, that clergymen are liable to all charges by act of parliament, unless they are specially exempted.

Thus they are, both in respect of their tithes and glebes, liable to contribute to watch and ward, to the repair of the highways, and may be rated or taxed by the commissioners of sewers; they, as well as laymen, are chargerble to the poor maimed soldiers or poor prisoners, constable rates, and shall contribute towards satisfying for a robbery committed within the hundred, and all other publick charges imposed by act of parliament. And this hath been resolved upon debate, as Hale chief justice said, before all the judges, T. 27 C. 2. in the case of *Webb and Batchelor*. Watf. ch. 40. 3 Keb. 255. 476. 1 Ventr. 273. 2 Lev. 139.

And particularly, in the case of *bridges*, the statute of the 22 H. 8. says, the justices of the peace shall assess *every inhabitant* towards their repair: by which words *every inhabitant* lord Coke says, all privileges or exemptions or discharges whatsoever from contribution (if any were) are taken away, altho' the exemption were by act of parliament. 2 *Inst.* 704.

And

And in respect of the *highways*, where the statutes direct that the *parishioners of every parish* shall repair, Mr. Hawkins observes thereupon, that persons in holy orders are within the purview of these statutes, in respect of their spiritual possessions, as much as any other persons whatsoever, in respect of any other possessions; for the words are general, and there is no kind of intimation that any particular persons shall be exempted more than others. 1 *Haw.* 204.

18. The *canonical* habit (properly speaking) is that which is enjoined by the canons of the church. But in a matter so fluctuating as that of dress, it is impossible to lay down rules for apparel in one age, which will not appear ridiculous in the next. In such case, the general rule can only be, that clergymen shall appear in habit and dress such as shall comport with gravity and decency, without effeminacy or affectation.

The canons for the habit of clergymen are chiefly these two that follow, which, for the reason abovementioned, are now become matters only of curiosity and speculation.

By a constitution of archbishop *Stratford*, in the year 1343, in the reign of king Edward the third: The outward habit often shews the inward disposition; and tho' the behaviour of the clergy ought to be the instruction of the laity, yet the prevailing excesses of the clergy, as to tonsure, garments, and trappings, give abominable scandal to the people, because such as have dignities, parsonages, honourable prebends, and benefices with cure, and even men in holy orders, scorn the tonsure (which is the mark of perfection, and of the heavenly kingdom), and distinguish themselves with hair hanging down to their shoulders, in an effeminate manner; and apparel themselves like soldiers rather than clerks, with an upper jump remarkably short, with excessive wide or long sleeves, not covering the elbows, but hanging down; their hair curled and powdered, and caps with tippets of a wonderful length; with long beards; and rings on their fingers; girt with girdles exceeding large and costly, having purses enamelled with figures and various sculptures gilt, hanging with knives (like swords) in open view; their shoes checquered with red and green, exceeding long, and variously indented; with croppers to their saddles, and horns hanging at the necks of their horses; and cloaks furred on the edges, contrary to the canonical sanctions, so that there is no distinction between clerks and laicks, which rendreth them unworthy of the privilege of their order: we therefore, to obviate these miscarriages, as well of the masters and scholars within the universities of our province, as of those without, with the approbation of this sacred council do ordain, that all beneficed men, those especially in holy orders, in our province, have their tonsure as comports with the state of clergymen; and if any of them do exceed by going in a remarkably short and close upper garment, with long or unreasonably wide sleeves, not covering the elbow, but hanging down, with hair unclipped, long beards, with rings on their fingers in publick (excepting those of honour and dignity), or exceed in any particular before expressed; such of them as have benefices, unless within six months time they shall effectually reform upon admonition given, shall incur suspension from their office *ipso facto*, and if they con-

Privileges and restraints of the clergy.

tinue under it for three months, they shall from that time be suspended from their benefice ipso jure without any further admonition: And they shall not be absolved from this sentence by their diocefans, till they pay the fifth part of one year's profit of their benefices to be distributed to the poor. If they be unbeneficed, they shall be disabled from obtaining a benefice for four months. And such as are students in the universities, and pass for clerks, if they do not effectually abstain from the premisses, shall be ipso facto disabled from taking any ecclesiastical degrees or honours in those universities, till by their behaviour they give proof of their discretion as becometh scholars. Yet by this constitution we intend not to abridge clerks of open wide surcoats, called table-coats, with fitting sleeves to be used at seasonable times and places; nor of short and close garments, whilst they are travelling in the country, at their own discretion. *Lind. 122. Johnf. Stratf.*

[Tonsure] This signifieth sometimes not only the shaved spot on the crown of the head, but the whole ecclesiastical cut, or having the hair clipt in such a fashion, that the ears might be seen, but not the forehead. *Johnf. Stratf.*

[Surcoats] Made to save better cloaths, especially in eating and drinking at home. *Lind. 124.*

And by the seventy fourth canon of the canons in the year 1603. Archbishops and bishops shall use the accustomed apparel of their degrees: Deans, masters of colleges, archdeacons and prebendaries in cathedral and collegiate churches (being priests or deacons), doctors in divinity law and physick, bachelors in divinity, masters of arts, and bachelors of law, having any ecclesiastical living, shall usually wear gowns with standing collars and sleeves strait at the hands, or wide sleeves, as is used in the universities, with hoods or tippets of silk or farsenet, and square caps. And all other ministers shall also usually wear the like apparel as is aforesaid, except tippets only. And all the said ecclesiastical persons above-mentioned shall usually wear in their journies cloaks with sleeves, commonly called priests cloaks, with guards, welts, long buttons, or cuts. And no ecclesiastical person shall wear any coife or wrought night cap, but only plain night caps of black silk, fatten, or velvet. In private houses, and in their studies, the said persons ecclesiastical may use any comely and scholarlike apparel, provided that it be not cut or pinkt, and in publick not to go in their doublet and hose, without coats or cassocks. And not to wear any light coloured stockings. Poor beneficed men and curates (not being able to provide themselves long gowns) may go in short gowns, of the fashion aforesaid.

Particularly, the *band*, we may observe, is no part of the canonical habit; being not so ancient as any canon of the church. Archbishop Laud is pictured in a ruff, which was worn at that time both by clergymen and gentlemen of the law; as also long before, during the reigns of king James the first, and of queen Elizabeth. The band came in with the

the puritans and other sectaries, upon the downfal of episcopacy; and in a few years afterwards became the common habit of men of all denominations and professions: which giving way in its turn, was yet retained by the gentlemen of the long robe (both ecclesiastical and temporal), only because they would not follow every caprice of fashion. Indeed most of the peculiar habits, both in the church and in courts of justice and in the universities, were in their day the common habit of the nation; and were retained by persons and in places of importance, only as having an air of antiquity, and thereby in some sort conducing to attract veneration: and the same, on the other hand, in proportion do persuade to a suitable gravity of demeanor; for an irreverent behaviour, in a venerable habit, is extremely burlesque and ungraceful.

19. By *Canon 75*. No ecclesiastical persons shall at any time, other than ^{Shunning} for their honest necessities, resort to any taverns or alehouses, neither shall ^{clerics except} they board or lodge in any such places. Furthermore, they shall not give themselves to any base or servile labour, or to drinking, or riot, spending their time idly by day or by night, playing at dice, cards, or tables, or any other unlawful game. But at all times convenient, they shall hear or read somewhat of the holy scriptures, or shall occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the church of god, having always in mind, that they ought to excel all others in purity of life, and should be examples to the people to live well and christianly, under pain of ecclesiastical censures to be inflicted with severity, according to the qualities of their offences.

20. Nevertheless, lord Coke says, by the common law of the land, ^{Recreations;} clergymen may use reasonable recreations, in order to make them fitter for the performance of their duty and office. 2 *Inst.* 309.

And albeit spiritual persons (he says) are prohibited, by the canon law, to hunt; yet by the common law they may use the recreation of hunting. And after the decease of every archbishop and bishop (amongst other things) the king time out of mind hath had his kennel of hounds, or a composition for the same. 2 *Inst.* 309.

The foundation of which custom was this: It appeareth by many records, that by the law and custom of England, no bishop could make his will of his goods or chattels coming of his bishoprick, without the king's licence. Whereupon the bishops, that they might freely make their wills, yielded to give to the king after their deceases respectively for ever six things: 1. Their best horse or palfrey, with bridle and saddle. 2. A cloak with a cape. 3. One cup with a cover. 4. One basin and ewer. 5. One ring of gold. 6. Their kennel of hounds. 2 *Inst.* 338.

21. By the 1 *H. 7. c. 4*. It shall be lawful to all archbishops and ^{May be im-} bishops, and other ordinaries having episcopal jurisdiction, to punish and ^{prisoned by} chastise priests, clerks, and religious men, as shall be convicted before ^{the spiritual} them by examination and other lawful proof requisite by the law of the ^{judge for in-} church, of advoutry, fornication, incest, or any other fleshly incontinency, ^{continence.} by committing them to ward and prison, there to abide for such time as
H h 2 shall

Privileges and restraints of the clergy.

shall be thought to their discretions convenient for the quality and quantity of their trespass.

Shall not take
to farm nor
traffick.

22. No spiritual person shall take to farm to himself, or to any person to his use, of the lease or grant of any person by writing, or by word or otherwise, by any manner of means, any manors, lands, tenements, or other hereditaments, for term of life, for term of years, or at will; on pain of 10l. a month, that he or any other to his use shall occupy any farm by reason of any such lease or grant: half to the king, and half to him that shall sue in any of the king's courts. 21 H. 8. c. 13. §. 1.

Provided, that this shall not extend to any spiritual person, for taking to farm any temporalities, during the vacation of any archbishoprick, bishoprick, or any collegiate or cathedral church. §. 4.

Nor to any spiritual person, that shall tender or make any traverse upon any office, concerning his freehold. §. 4.

And provided, that every spiritual person may take in farm any messes, manions, or dwelling houses, having but only orchards or gardens, in any city, borough, and town, for his own habitation or dwelling. §. 35.

And moreover by the same statute, no spiritual person shall by himself, nor by any other for him or to his use, bargain and buy to sell again for any lucre, gain, or profit, in any markets, fairs, or other places, any manner of cattle, corn, lead, tin, hides, leather, tallow, fish, wool, wood, or any manner of victual or merchandise; on pain of treble value of every thing so bargained and bought to sell again: half to the king, and half to him that will sue in any of the king's courts. And the bargain to be void. §. 5.

Provided, that if any such spiritual person shall happen without fraud or covin, to buy any horses, mares, or mules, to the only intent to occupy for himself or his servants, to ride to and fro upon his necessary businets, or any other cattels or goods, to the only intent at the buying thereof to be employed and put in and about his necessary apparel of his own house, or of his person and servants, or in for and about the only occupying, manuring, or tillage of his own glebe or demean lands annexed to his church, or for the necessary expences of his own household keeping; and after the buying of any such horses, cattels or goods, or exercise of them, happeneth to mislike any of them that they should not be good, profitable, nor convenient for any the said purposes for the which they were bought: such person may lawfully bargain and put away such things, without fraud or covin. §. 6.

And provided, that every spiritual person, *not having sufficient glebe or demean lands in their own hands in the right of their churches, for pasturage of cattel, or for increase of corn, for the only expences of their households, or for their carriages or journies, may take in farm other lands, and buy and sell corn and cattle for the only manurance, tillage, and pasturage of such farms, so that the increase thereof be alway employed for the only expences in their households and hospitalities, and not in any wise to buy and sell again for any other commodity, lucre, or advantage, any corn or cattle renewing, coming or growing in and upon any such farm or otherwise, but only the remain and overplus above their expences*

pences of their households, if any such shall happen of the breed and increase thereof, without fraud or covin. f. 8.

Not having sufficient glebe] This hath been pleaded, and the plea allowed, as oft as any action hath been brought upon this statute. *Gibf.* 159.

23. No spiritual person shall have, use, or keep by himself or by any person to his use any tanhouse; nor any brewhouse, to any other use than a tanhouse or only to be spent and occupied in his own house: on pain of 10l a month; half to the king, and half to him that will sue in any of the king's courts. *brewhouse.*

21 *H. 8. c. 13. f. 32.*

24. By *Canon 76.* No man being admitted a deacon or minister, shall from thenceforth voluntarily relinquish the same, nor afterwards use himself in the course of his life, as a layman; upon pain of excommunication. And the churchwardens shall present him. *Shall not relinquish his profession.*

25. After all, these distinctions of the clergy are shadows rather than substance; being most of them about matters which are obsolete and of no significance. The *restraints*, as to the scope and purport of them, are such as the clergy for the most part would chuse to put upon themselves: and the *privileges*, such as they are, seem to be scarcely worth claiming; and some of them one would almost imagine to have been calculated to bring a disgrace upon the clergy, rather than to be of any real benefit to them; for why should a clergyman be protected from paying his just debts more than any other person, or be saved from punishment for a crime for which another person ought to be hanged? And it is hoped, there hath not been one instance, of a clergyman having needed to claim the privilege of his order a second time, for a crime for which a layman by the laws of his country should suffer death. *Conclusion.*

Probate of wills. See *Wills.*

Proctor.

1. **P**ROCTORS are officers established to represent in judgment the parties who empower them (by warrant under their hands, called a *proxy*) to appear for them, to explain their rights, to manage and instruct their cause, and to demand judgment. 2 *Dom.* 583.

2. By the 3 *Jas. c. 5.* No recusant convict shall practise in the civil law as proctor. f. 8.

And by the 5 *G. 2. c. 18.* No proctor in any court shall be a justice of the peace, during such time as he shall continue in the business and practice of a proctor. f. 2.

3. By the several stamp acts; every admission of any person to the office of proctor in any of the courts, shall be upon a treble 40sh stamp.

4. *Can.*

4. *Can. 129.* None shall procure in any cause whatsoever, unless he be thereunto constituted and appointed by the party himself, either before the judge, or by act in court; or unless in the beginning of the suit, he be by a true and sufficient proxy thereunto warranted and enabled. We call that proxy sufficient, which is strengthened and confirmed by some authentical seal, and party's approbation, or at least his ratification therewithal concurring. All which proxies shall be forthwith by the said proctors exhibited into the court, and be safely kept and preserved by the register in the publick registry of the said court. And if any register or proctor shall offend herein, he shall be seclused from the exercise of his office for the space of two months, without hope of release or restoring.

5. *Otho.* Whereas a custom is said to prevail, that he who is cited to a certain day, constitutes a proctor for that day without letters, or by letters not sealed with an authentic seal; by which means it happeneth, that whilst such proctor will not prove his mandate, or confirm his letters by witnesses, or some other impediment comes in the way, nothing is done that day, nor on the following day, the proctor's office being at an end; and so all former diligence is lost without any effect: As a caution against this fallacy, we do ordain, that for the future a special proctor be constituted absolutely without any limitation of time; or if he be constituted for the day, yet not for one day only, but for several days, to be continued if need be. And the mandate shall be proved by an authentic writing; unless he be constituted in the acts of court, or the constitutor cannot easily find an authentic seal. *Atton 61.*

6. *Peccham.* We do ordain, that no dean, archdeacon or his official, or bishop's official, shall set his seal to any proxy, unless it be publickly requested of him in court, or out of court when he who constituteth the proctor and is known to be the principal party is present and personally requesteth it: And whatsoever dean, archdeacon or his official, or official of the bishop, shall do the contrary out of certain malice, shall be ipso facto suspended from his office and benefice for three years. And if any advocate shall procure a false proxy to be made, he shall be suspended for three years from his office of advocate, and be disabled to hold any ecclesiastical benefice, and if he be married or bigamus [*whereby in those days he was incapacitated to hold a benefice*] he shall be excommunicated ipso facto; and whatever shall be done by virtue of such false proxy shall be utterly void to all intents and purposes, and the proctor who was the chief actor in such falsity shall be for ever repelled from executing any legal act. And all of these nevertheless, if they shall be convicted, shall be bound to render damages to the party injured. *Lind. 76.*

7. *Can. 130.* For lessening and abridging the multitude of suits and contentions, as also for preventing the complaints of suitors in courts ecclesiastical, who many times are overthrown by the oversight and negligence, or by the ignorance and insufficiency of proctors; and likewise for the furtherance and increase of learning, and the advancement of civil and canon law; following the laudable customs heretofore observed in the courts pertaining to the archbishop, we will and ordain that no proctor

proctor exercising in any of them shall entertain any cause whatsoever, and keep and retain the same for two court days, without the counsel and advice of an advocate, under pain of a year's suspension from his practice: neither shall the judge have power to release or mitigate the said penalty, without express mandate and authority from the archbishop.

H. 2 W. Leigh's case. A proctor of doctors commons, who had done business without the advice of an advocate, contrary to the canon, and refused to pay a tax of 10s imposed upon him by order of the court towards the charges of the house, and was suspended from his office, prayed a mandamus in the court of king's bench to be restored: but it was denied, and said by the court, that officers are incident to all courts, and must partake of the nature of those several and respective courts in which they attend; and the judges, or those who have the supreme authority in such courts, are the proper persons to censure the behaviour of their own officers; and if they should be mistaken, the king's bench cannot relieve: for in all cases, where such judges keep within their bounds, no other court can correct their errors in proceedings; and if any wrong be done in this case, the party must appeal. *Gibf. 995. 3 Mod. 332.*

8. *Can. 131.* No judge, in any of the said courts, shall admit any libel or any other matter, without the advice of an advocate admitted to practise in the same court, or without his subscription; nor shall any proctor conclude any cause depending, without the knowledge of the advocate retained and fee'd in the cause: which if any proctor shall do or procure to be done, or shall by any colour whatsoever defraud the advocate of his duty or fee, or shall be negligent in repairing to the advocate and requiring his advice what course is to be taken in the cause; he shall be suspended from all practice for the space of six months, without hope of being thereunto restored before the said term be fully compleat.

9. *Can. 133.* Forasmuch as it is found by experience, that the loud and confused cries and clamours of proctors in the courts of the archbishop, are not only troublesome and offensive to the judges and advocates, but also give occasion to the standers-by of contempt and calumny toward the court it self; to the end that more respect may be had to the dignity of the judge, and that causes may more easily and commodiously be handled and dispatched, we charge and injoin, that all proctors in the said courts do especially intend, that the acts be faithfully entred and set down by the register, according to the advice and direction of the advocate; that the said proctors refrain loud speech and babling, and behave themselves quietly and modestly, and that when either the judges or advocates or any of them shall happen to speak, they presently be silent; upon pain of silencing for two whole terms then immediately following every such offence of theirs: And if any of them shall the second time offend herein, and after due monition shall not reform himself, let him be for ever removed from his practice.

10. It hath been adjudged, that no mandamus lies to restore a proctor of doctors commons, admitting that no appeal lay from the dean of the arches to the archbishop as visitor; because this is an ecclesiastical office

Proctor.

office, and a matter properly and only cognizable in that court; and that the temporal courts are not to intermeddle, or inquire into this sentence, or into the proceedings in any matters whereof they have a proper jurisdiction, but are to give credit thereunto; altho' it was urged, that if a mandamus did not lie in this case, the party would be without remedy, for that no assize would lie of this office; and tho' an action on the case might lie, yet it may be defective, because a jury may not well compute the damages in proportion to the loss of a man's livelihood; besides it was urged, that a mandamus ought to lie in this case, as well as for an attorney of an inferior court, because this is an officer of a more publick concern. 3 *Bac. Abr.* 531.

For the fees of proctors; see Tit. **Fees.**

Procurator. See **Visitator.**

Profaneness.

Profaneness
indictable by
the common
law.

1. **A**LL blasphemies against god, as denying his being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the holy scripture, or exposing any part thereof to contempt or ridicule; all impostures in religion, as falsely pretending to extraordinary commissions from god, and terrifying or abusing the people with false denunciations of judgments; and all open lewdness grossly scandalous; inasmuch as they tend to subvert all religion or morality, which are the foundation of government, are punishable by the temporal judges with fine and imprisonment, and also such corporal infamous punishment as to the court in discretion shall seem meet, according to the heinousness of the crime. 1 *Haw.* 7.

Also, seditious words, in derogation of the established religion, are indictable, as tending to a breach of the peace; as these, your religion is a new religion, preaching is but prattling, and prayer once a day is more edifying. 1 *Haw.* 7.

Depraving the
christian reli-
gion by words
or writing.

2. By the 9 & 10 *W. c.* 32. If any person, having been educated in, or at any time having made profession of the christian religion within this realm, shall by writing printing teaching or advised speaking deny any one of the persons in the holy trinity to be god, or shall assert or maintain there are more gods than one, or shall deny the christian religion to be true, or the holy scriptures of the old and new testament to be of divine authority, and shall upon indictment or information in any of his majesty's courts at Westminster or at the assizes, be thereof lawfully convicted by the oath of two or more witnesses; he shall for the first offence be disabled to have any office or employment or any profit appertaining thereunto; for the second offence shall be disabled to prosecute any action or information.

information in any court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office for ever within this realm, and shall also suffer imprisonment for the space of three years from the time of such conviction. *f. 1.*

Provided, that no person shall be prosecuted by this act for any words spoken, unless the information thereof shall be given upon oath before a justice of the peace, within four days after such words spoken; and the prosecution of such offence be within three months after such information. *f. 2.*

Provided, that any person, convicted of any the aforesaid crimes, shall for the first offence (upon his acknowledgment and renunciation of such offence or erroneous opinions in the same court where he was convicted, within four months after his conviction) be discharged from all penalties and disabilities incurred by such conviction. *f. 3.*

3. By the 3 *Jas. c. 21.* If any person shall in any stage-play, enterlude, shew, may-game, or pageant, jestingly or profanely speak, or use the holy name of god, or of Christ Jesus, or of the holy ghost, or of the trinity, which are not to be spoken but with fear and reverence; he shall forfeit 10*l.* half to the king, and half to him that shall sue for the same in any court of record at Westminster. *Profaning the same stage plays.*

4. In the year 1656, James Nailer for personating our saviour, and suffering his followers to worship him, and pay him divine honours, was sentenced to be set in the pillory, and to have his tongue bored through with a red hot iron, and to be whipped, and stigmatized in the forehead with the letter B. *1 St. Tr. 802. Naylor's case.*

5. *M. 1 G. 2. K. and Curl.* An information was exhibited by the attorney general, against the defendant Edmund Curl, for printing and publishing a certain obscene book, setting forth the several lewd passages, and concluding against the peace. It was moved in arrest of judgment, that however the defendant may be punishable for this in the spiritual court, as an offence against good manners, yet it cannot be a libel for which he is punishable in the temporal courts. But after long debate and consideration, the court at last gave it as their unanimous opinion, that this was a temporal offence; and the defendant was set in the pillory. *Str. 788. Curl's case.*

6. *E. 2 G. 2. K. and Woolston.* He was convicted on four informations for his blasphemous discourses on the miracles of our saviour. And attempting to move in arrest of judgment, the court declared they would not suffer it to be debated, whether to write against christianity in general was not an offence punishable in the temporal courts at common law. They desired it might be taken notice of, that they laid their stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points. The next term he was brought up, and fined 25*l.* for each of his four discourses, to suffer a year's imprisonment, and to enter into a recognizance for his good behaviour during his life, himself in 3000*l.* and 2000*l.* by others. *Str. 834. Woolston's case.*

Navy.

7. By the 22 G. 2. c. 33. art. 2. All flag officers, and all persons in or belonging to his majesty's ships or vessels of war, being guilty of profane oaths, cursings, execrations, drunkenness, uncleanness, or other scandalous actions, in derogation of god's honour, and corruption of good manners, shall incur such punishment as a court martial shall think fit to impose, and as the nature and degree of their offence shall deserve.

For profane cursing and swearing, See title **Swearing**.

Heresy, is treated of under the title of that name.

Prohibition.

Not grantable
in cases merely
spiritual.

1. **B**Y the statute of Circumspecte agatis, 13 Ed. 1. ft. 4. *The king to his judges sendeth greeting. Use your selves circumspectly in all matters concerning the bishop of Norwich and his clergy, not punishing them if they hold plea in court christian of such things as be mere spiritual, that is to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like, for the which sometimes corporal penance, and sometimes pecuniary is enjoined, specially if a freeman be convict of such things: Also if prelates do punish for leaving the churchyard unclosed, or for that the church is uncovered or not conveniently decked; in which cases none other penance can be enjoined but pecuniary: Item, if a parson demand of his parishioners oblations or tithes due and accustomed; or if any parson do sue against another parson for tithes greater or smaller, so that the fourth part of the value of the benefice be not demanded: Item, if a parson demand mortuaries, in places where a mortuary hath been used to be given: Item, if a prelate of a church, or a patron, demand of a parson a pension due to him; all such demands are to be made in a spiritual court. And for laying violent hands on a clerk, and in cause of defamation, it hath been granted already, that it shall be tried in a spiritual court, when money is not demanded, but a thing done for punishment of sin; and likewise for breaking an oath: In all cases afore rehearsed, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.*

In all matters concerning the bishop of Norwich and his clergy] The bishop of Norwich is here put but for example; but it extendeth to all the bishops within this realm. 2 Inst. 487. The said act having been made on a petition of the bishop of Norwich; as, generally, acts of parliament in ancient times were founded on antecedent petitions.

Of such things as be mere spiritual] Not having any mixture of the temporalities; as heresy, schisms, holy orders, and the like. 2 Inst. 488.

So that the fourth part of the value of the benefice be not demanded] So as at this day, in case where one parson of the presentation of one patron demands tithes against another parson of the presentation of another patron in

in court christian, amounting to a fourth part of the value of the benefice; the right of tithes at this day is to be tried at the common law. 2 *Inst.* 491.

2. It hath been holden, that if the spiritual court do proceed wholly on their own canons, they shall not be at all controuled by the common law (unless they act in derogation from it, as by questioning a matter not triable before them, as the bounds of a parish, or the like); for they shall be presumed to be the best judges of their own laws: and therefore in such case, if a person is aggrieved, his proper remedy is not by prohibition, but by appeal. 1 *Haw.* 4. 13. *Ayl. Par.* 171, 438.

3. In case the principal matter belong to the cognizance of the spiritual court, all matters incidental (tho' otherwise of a temporal Nature) are also cognizable there; and no prohibition will lie, provided they proceed in the trial of such temporal incident, according to the rules of the temporal law.

Thus in the case of *Shorter and Friend*, *H. 1 W.* An executor being sued for a legacy in the spiritual court, pleaded payment, and offered to prove it by one witness; which the judge refused, and gave sentence against him. Upon this matter suggested, a prohibition was moved for. And by the court; 1. Where the ecclesiastical court proceedeth in a matter merely spiritual, if they proceed in their own manner, tho' it is different from the common law, no prohibition lieth; as in probate of wills, there if they refuse one witness, no prohibition lieth. 2. Where they have cognizance of the original matter, and an incident happens which is of temporal cognizance, or triable by the common law; they shall try the incident, but must try it as the common law would: thus in a suit for tithes, or for a legacy, if the defendant pleads a release or payment; or in a suit to prove a will, if the defendant plead a revocation. So in the case at bar; they shall try the matter of payment or no payment, but then they must admit such proof as the common law would, or otherwise they reject the cause themselves, and ought to be prohibited. 3. A bare suggestion, that the defendant hath but one witness, and that they take exception to his credit and reputation, is no cause of prohibition; for if they admit the proof of one witness, whether he be a credible witness or not they shall judge, and the party hath no remedy but by appeal. 2 *Salk.* 547. *L. Raym.* 220.

4. A temporal loss, ensuing upon a spiritual sentence, is not of it self cause of prohibition. So it was adjudged in the 42 & 43 *Eliz.* in the case of *Baker and Rogers* (*Cro. Eliz.* 789.), where the deprivation was for simony; on which occasion the reasoning of the court was thus: Altho' it was said, that in the spiritual court they ought not to have intermeddled to divest the freehold, which is in the incumbent after induction; true it is, they should not meddle to alter the freehold, but they meddled only with the manner of obtaining his presentment, which by consequence divested the freehold from him, by the dissolution of his estate, when his admission and institution is avoided. In like manner, where an incumbent (3 *Mod.* 67.) was libelled against in the arches, for not being twenty-three years of age when made deacon, nor twenty-four when made priest, and prayed a prohibition, because a temporal loss (namely, deprivation) might

might follow; the court denied the prohibition, and compared this case to that of a drunkard, or ill liver, who are usually punished in the ecclesiastical courts, tho' a temporal loss may ensue; and if prohibitions should be granted in all cases where a temporal loss might ensue, those courts would have little or nothing to do. *Gibf. 1028.*

For temporal
matter mixt
with spiritual.

5. *M. 1 Ann. Galizard and Rigault.* There was an indictment for assaulting, beating, wounding, and endeavouring to ravish the wife of B. upon which the party was convicted: and afterwards the husband brought an action of trespass, for the same cause: and now the party being also libelled against in the spiritual court for the same fact, namely, for soliciting her chastity, moved for a prohibition to the proceedings in the spiritual court. And it was urged for the jurisdiction of the spiritual court, that they may punish for the solicitation and incontinence, and that this suit was for the health of the soul, the others for fine and damages. But by the court a prohibition was granted; for it being an attempt and solicitation to incontinence, coupled with force and violence, it doth by reason of the force, which is temporal, become a temporal crime in toto; as if one say, thou art a whore and a thief, or thou keepest a bawdy house, which are temporal matters, the party shall not proceed in the spiritual court; so if it be said of a woman that she is a bawd only, and not that she keeps a bawdy house: but, Holt chief justice said, if one commit adultery, and the husband bring assault and battery, this shall not hinder the spiritual court, for it is a criminal proceeding there, and no indictment lies at the common law for adultery. *2 Salk. 552.*

But if a man libel for two distinct things, the one of which is of ecclesiastical cognizance, and the other not; a prohibition shall be granted as to that which is of temporal cognizance, and they of the court christian shall proceed for the other. *L. Raym. 59.*

On trial of
customs.

6. *H. 10 W.* The churchwardens against the rector of *Market Bosworth.* The churchwardens libel against the rector, that there hath been time out of mind, and is, a chapel of ease within the same parish; and that the rector of the said parish for time out of mind hath repaired and ought to repair the chancel of the said chapel; and that the chancel being out of repair, the defendant being rector hath not repaired it. The rector in the said court denied the custom. And a decree was made for the rector, that there was no such custom, and costs were taxed there for the said rector. The churchwardens moved for a prohibition; and it was argued for the prohibition, that it ought to be granted, because it appears that the libel is upon a custom, which the defendant hath denied; and it may be the question was in the spiritual court, custom or not, which is not triable there, but at the common law; and then this appearing upon the libel, that the court hath not jurisdiction, a prohibition may be granted after sentence. But all the court held the contrary. For by Holt chief justice; The reason for which the spiritual court ought not to try customs is, because they have different notions of customs, as to the time which creates them, from those that the common law hath: For in some cases the usage of ten years, in some twenty, in some thirty years, make a custom in the spiritual court; whereas by the common law it must be for time

time immemorial. And therefore since there is so much difference between the laws, the common law will not permit that court to adjudge upon customs, by which in many cases the inheritances of persons may be bound. But in this case, that reason fails: for the spiritual court is so far from adjudging that there is any such custom which the common law allows, that they have adjudged that there hath not been any custom allowed by their law, which allows a less time than the common law to make a custom. And the plaintiffs having grounded their libel upon a custom, which was well grounded if the custom had not been denied (for libels there may be upon customs), but the custom being denied and found no custom, it is not reason to prohibit the court in executing their sentence against the plaintiffs. For the design of a motion for a prohibition, is only to excuse the plaintiffs from costs. And there is no reason but that they ought to pay them; since it appears, that they have vexed the defendant without cause. And therefore a prohibition was denied.

L. Raym. 435.

T. 12 W. Jones and Stone. David Jones the vicar of *N.* was libelled against in the spiritual court, for that by custom time out of mind, the vicars of *N.* had by themselves or others, said and performed divine service in the chapel of Chawbury, for which there was such a recompence, and that he neglected. The defendant came for a prohibition, and without traversing this custom, suggested that all customs were triable at common law. And it was urged, that it was enough for a prohibition, that a custom appeared to charge the vicar with a duty, for which he was not liable of common right. But by Holt chief justice; A parson may be bound to an ecclesiastical duty by custom, and when he is bound by custom, the spiritual court may punish him if he neglects that duty; the custom might have a reasonable commencement by composition in the spiritual court, and begin by an ecclesiastical act; and a bare prescription only is not a sufficient ground for a prohibition, unless it concerns a layman; whereas here it is an ecclesiastical right, an ecclesiastical person, and an ecclesiastical duty, and the prescription not denied. *2 Sal.* 550.

7. When the issue of a matter depending in the spiritual court, is determined or influenced by any statute, a prohibition lieth. The reason is, because the temporal judges have the interpretation of all statutes or acts of parliament, whether they concern temporal matters or spiritual. On the construction of acts of parliament.

In some of the books there is an intimation, that not only all statutes whatever are to be interpreted by the temporal courts; but also that when a statute is made, giving remedy in a matter of ecclesiastical cognizance, the very making of such statute doth ipso facto take the right of jurisdiction from the spiritual court, and transfer it to the temporal; if there is not a special saving in the act, to preserve the spiritual jurisdiction. But to this the rule laid down by lord Coke, (which is also generally followed by the books) is a full answer:—An act of parliament being in the affirmative doth not abrogate or take away the jurisdiction ecclesiastical, unless words in the negative be added, as *and not otherwise, or in no other manner or form, or to the like effect.* *Gibf.* 1028.

On refusal of
a copy of the
libel.

8. *T. 2 An.* By Holt chief justice: It was formerly held by all the judges of England, that when there was a proceeding *ex officio* in the ecclesiastical court, they were not bound to give the party a copy of the articles; but the law is otherwise, for in such cases, if they refuse to give a copy of the articles, a prohibition shall go until they deliver it; and accordingly, upon motion, a prohibition was granted in the like case by Holt chief justice and the court. *L. Raym.* 991.

On a collateral
surmise.

9. Prohibition may be granted upon a collateral surmise; that is, upon a surmise of some fact or matter not appearing in the libel. It was heretofore a petition of the clergy to the king in parliament, that no prohibition might be granted, without first shewing the libel; and it was a complaint of archbishop Bancroft in the time of king James the first, that prohibitions were granted without sight of the libel, which (as it was there said) is the only rule and direction for the due granting of a prohibition, because upon diligent consideration thereof it will easily appear, whether the cause belong to the temporal or ecclesiastical cognizance; as, on the other side, without sight of the libel, the prohibition must needs range and rove with strange and foreign suggestions, at the will and pleasure of the deviser, nothing pertinent to the matter in demand. To this charge of granting prohibitions without sight of the libel, the judges in their answer say nothing; but as to granting them upon suggestion of matters not contained in the libel, their words are these; 'Tho' in the libel there appear no matter to grant a prohibition, yet upon a collateral surmise the prohibition is to be granted; as, where one is sued in the spiritual court for tithes of *sylva cædua*, the party may suggest, that they were grofs or great trees, and have a prohibition, yet no such matter appeareth in the libel; so if one be sued there for violent hands laid on a minister by an officer, as a constable, he may suggest, that the plaintiff made an affray upon another, and he to preserve the peace laid hands on him, and so have a prohibition; and so in very many other like cases; and yet upon the libel no matter appeareth, why a prohibition should be granted. *Gibf.* 1027.

On the hus-
band's suing
on the wife's
cause of action.

10. *H. 13 W.* Libel in the spiritual court by the husband and wife, for calling the husband cuckold: Ruled by Holt chief justice, that a prohibition shall go, because they cannot both sue in that court for that word, but the wife only, the imputation being upon her; and the husband and wife by the law spiritual may not join in suit in the ecclesiastical court as they must do in the temporal, but each shall sue separately upon their own cause of action. *3 Salk.* 288.

Suggestion to
be first moved
in the spiritual
court.

11. The suggestion must have been moved, and rejected in the spiritual court, before it can be admitted in the temporal court.—In the bishop of *Winchester's* case (*2 Co.* 45.) it was held, that in a suit for tithes in the spiritual court, a man may have a prohibition, suggesting a prescription or modus, before or without pleading. But this seems not to be law. For in the *12 W.* a prohibition was moved for, suggesting a custom: But it was denied by Holt chief justice and the court, unless they pleaded it below, because perhaps they might admit the plea. Also in the *10 W.* it was said by Holt chief justice, that if a modus be pleaded in the spiritual court,

court, and admitted, no prohibition shall go; but if the question be, whether a modus or no modus, a prohibition shall go; and so is the law, viz. wherever the matter which you suggest for a prohibition is foreign to the libel, you must plead it below, before you can have a prohibition; otherwise where the cause of prohibition appears on the face of the libel.

2 Salk. 551.

12. *M. 4 An. Burdett and Newell.* A rule was made to shew cause, why a prohibition should not be granted, to stay a suit against the plaintiff, in the court of the archdeacon of Litchfield, for not going to his parish church nor any other church on Sundays or holidays, nor receiving the sacrament thrice a year; upon suggestion of the statute of *Eliz.* and the toleration act, and then qualifying himself within that act; and alledging that he pleaded it below, and that they refused to receive his plea. It was shewed for cause, that this fact was false, and the plaintiff was not a dissenter, nor had qualified himself as above; and therefore it was moved, that the court would not allow the rule to stand, unless they had an affidavit of the fact; for by that means any person might come and suggest a false fact, and oust the spiritual court of their jurisdiction. Which was agreed to by the court, and therefore the rule was discharged. *L. Raym.* 1211.

Affidavit to be made of the suggestion.

And, by Holt chief justice, the distinction is this: Where the matter suggested appears upon the face of the libel, we never insist upon an affidavit; but unless it appear upon the face of the libel, or if you move for a prohibition as to more than appears on the face of the libel to be out of their jurisdiction, you ought to have affidavit of the truth of the suggestion. 2 Salk. 549.

13. It is said, the suggestion need not be precisely proved, in order to obtain a prohibition. For where the suggestion was for a modus for lamb and wool, tho' the proof failed as to the wool, and it was urged that therefore they had failed in the whole; yet a prohibition was granted. And in the case of *Austen and Pigot*, it was said, that the proof in a prohibition need not to be so precise, but if it appears, that the court christian ought not to hold plea thereof, it sufficeth. *Gibbs.* 1029.

Strict proof of the suggestion not necessary.

But if the suggestion appears to the court to be notoriously false, they will not grant a prohibition; for by Holt chief justice, they ought to examine into the truth of the suggestion, and see what foundation it hath. *L. Raym.* 587.

14. Lord Coke says, the suggestion for a prohibition may be traversed in the temporal court. 2 *Inst.* 611.

Suggestion traversable.

And Dr Watson says, if the suggestion for a prohibition contains no other matter upon which a prohibition ought to be granted to the spiritual court, besides the refusal of a plea there, which by the common law is a good plea, and ought to have been allowed, in such case the refusal is traversable. Therefore supposing that a modus decimandi, or a prescription of a manner of tithing, is triable in the spiritual court; if in a suit there for a modus decimandi another modus be pleaded, or that there is no such modus, and that plea is refused; or if in a suit for tithes of lands not tithe-free, a prescription is pleaded as to the manner of tithing, and that

that plea is refused; and a prohibition is moved for, upon suggestion of such refusal; the refusal being the principal matter of the suggestion, is therefore traversable. *Watf. c. 58.*

Not on the
last day of the
term.

15. Prohibitions are not to be granted on the last day of the term. So is the rule set down in the books; to which Rolle adds, nor on the last day save one: and the reason of both is, that there would not be time for notice to be given to the other side. But it is added in Latch, that upon motion, on the last day of the term, there may be a rule to stay proceedings till the next term. *Gibf. 1029.*

May be after
sentence.

16. *T. 10 W. Gardner and Booth.* Where it doth appear in the libel, or by the proceedings in the cause, that the cognizance of the cause doth not belong to the spiritual court; a prohibition may be moved for and granted after sentence: and this holds in all cases but where one is sued out of his diocese; for there, if he doth not take advantage of it before sentence, he shall not have a prohibition after sentence; and the reason is, for that the cause doth belong to the spiritual court; and tho' it doth not belong to that spiritual court, it belongs to some other, and not to the king's temporal court. *2 Salk. 548.*

So in the case of *Parker and Clarke, M. 3 An.* The clerk of a parish libelled against the churchwardens, for so much money due to him by custom every year, and to be levied by them on the respective inhabitants in the said parish; and after sentence in the spiritual court, the defendants suggested for a prohibition, that there was no such custom as the plaintiff had set forth in his libel. It was objected against granting the prohibition, that it was now too late, because it was after sentence, especially since the custom was not denied; for if it had, and that court had proceeded, then and not before it had been proper to move for a prohibition. But by Holt chief justice; It is never too late to move the king's bench for a prohibition, where the spiritual court hath no original jurisdiction, as they had not in this case, because the clerk of a parish is neither a spiritual person, nor is this duty in demand spiritual, for it is founded on a custom, and by consequence triable at law; and therefore the clerk may have an action on the case against the churchwardens, for neglecting to make a rate, and to levy it, or if it had been levied, and not paid by them to the plaintiff. *6 Mod. 252. 3 Salk. 87.*

Plaintiff may
have a prohi-
bition.

17. The plaintiff, as well as defendant, in the spiritual court, may have a prohibition to stay his own suit. To this purpose when archbishop Bancroft alledged that the plaintiff's having made choice thereof, and brought his adversary there into trial, should by all intendment of law and reason and by the usage of all other judicial places thereby conclude himself in that behalf; yet the answer of the judges was, that none may pursue in the ecclesiastical court, for that which the king's court ought to hold plea of; but upon information thereof given to the king's courts, either by the plaintiff or by any mere stranger, they are to be prohibited, because they deal in that which appertaineth not to their own jurisdiction. And in the case of *Worts and Chyston, M. 12 Ja.* the same thing was declared and adjudged in the court of king's bench. *Gibf. 1027. Cro. Ja. 350.*

18. If the defendant in a prohibition die; his executors may proceed Party dying. in the spiritual court, and the judges of that court out of which the prohibition was granted, will also in such case make a rule to the spiritual court to proceed: but the plaintiff may, if he pleaseth, have a new prohibition against the executors. *Watf. c. 55.*

19. A prohibition takes off the costs assessed upon an appeal, where Costs. the cause is returned to the inferior court. This was adjudged, *E. 7 Cha.* in the case of *Crompton and Watersford*; where an appeal had been to the delegates, who overruled it, and assessed costs for the wrong appeal: And the court agreed with Richardson, that because a prohibition stays all proceedings, the costs were taken away; and added, that if the party was excommunicate, he should be absolved. *Hetl. 167. Litt. 365. Gibf. 1029.*

By the statute of the 8 & 9 *W. c. 11.* *In suits upon prohibitions, the plaintiff obtaining judgment or any award of execution, after plea pleaded, or demurrer joined therein, shall recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same.* f. 3.

H. 4 G. Sir Henry Houghton and Starkey. After judgment for the plaintiff in prohibition, the question was, what costs ought to be allowed; and whether they should be computed from the first motion, or only from the declaration, was the doubt. Upon search, it was found to be the course of all the courts, to tax only from the time of declaring, except in two instances; the one in the case of *Eads and Jackson* in the 2 *Geo*; and the other in the case of *Brown and Turner*: where they were allowed from the first motion. And of this opinion were all the judges. And all the officers were directed for the future to allow the costs of the first motion. And afterwards, *H. 12 Geo.* between *Sweetnam and Archer*, it was stated in the same manner, and agreed to be the uniform practice ever since. And, *E. 1 Geo. 2.* between Sir Thomas Bury and Cross, the same doubt was raised by a new master; and the court ordered costs from the first motion. *Str. 82.*

M. 10 G. 2. *Middleton and Croft.* The plaintiff in prohibition, having prevailed in one point, altho' he failed in all the rest, moved for costs; and it was moved that they might be taxed from the time of the first motion, according to several determinations. And this last was acquiesced in, if the court should be of opinion for costs. As to which, it was objected, that the point in which the plaintiff prevailed was not the git of the proceedings, but only a circumstance; and that it would be very hard, that they who had prevailed upon the merits, should pay costs. But by the court, The words of the act are not to be got over, which give costs to the plaintiff if he obtains any judgment: and this matter was under consideration in the house of lords in *Dr Bentley's* case, where the prohibition stood as to some articles, and there was a consultation for the rest: to be sure it will be considered in the quantum, but we cannot deny costs. *Str. 1062.*

Prohibition.

H. 14 G. 2. Gegge and Jones. Upon shewing cause against a prohibition, the court made the rule absolute, with a direction that the plaintiff should declare in prohibition. He tendred a declaration, but the defendant refused it, and applied to stay proceedings, as being willing to submit. The other insisted he had a right to go on, and so get the costs of the motion, which he could not otherwise have. But the court stayed the proceedings without costs; saying, the direction to declare was in favour of the defendant, who might waive it. *Str. 1114.*

Conclusion.

20. To conclude; Sir Simon Degge observeth, that prohibitions of themselves are excellent things, where they are used upon just, legal, and true grounds; and have often avoided the usurpations of the popes and spiritual courts. But by the corruption of these later times, they are grown very grievous to the clergy (in the recovering of their tithes and other rights), being too often granted upon feigned and untrue suggestions, which it is impossible the judges should foresee without the spirit of prophecy. And (he adds) I think I may presume to say, that where one was granted before queen Elizabeth's time, there have been a hundred granted in this last age. And they are a very great delay and charge to the clergy; and it were well (says he) in my poor judgment, if the reverend judges would think of some way to restrain them, or to make them pay well for their delay, by making the plaintiff enter into recognizance to pay such costs as the court out of which they issue should award, in case they should not prove their suggestion in convenient time; or some such other course as they in their great wisdom shall think just and meet. *Deg. p. 2. c. 26.*

Note, **Consultation** is treated of under the title of that name.

Provifors. See Courts.

Psalmody. See Publick worship.

Publick Notary. See Notary Publick.

Publick worship.

- I. *Due attendance on the publick worship.*
- II. *Establishment of the book of common prayer.*
- III. *Orderly behaviour during the divine service.*
- IV. *Performance of the divine service, in the several parts thereof.*

I. *Due*

I. *Due attendance on the publick worship.*

1. *Can. 90.* **T**HE churchwardens or questmen of every parish, and two or three more discreet persons to be chosen for side-men or assistants, shall diligently see that all the parishioners duly resort to their church upon all fundays and holidays, and there continue the whole time of divine service: and all such as shall be found slack or negligent in resorting to the church (having no great or urgent cause of absence) they shall earnestly call upon them; and after due monition (if they amend not) they shall present them to the ordinary of the place. All persons shall resort to church.

2. By the 5 & 6 Ed. 6. c. 1. *All persons shall diligently and faithfully (having no lawful or reasonable excuse to be absent) endeavour themselves to resort to their parish church or chapel accustomed, or upon reasonable let thereof, to some usual place where common prayer and such service of god shall be used in such time of let, upon every sunday and other days ordained and used to be kept as holidays; and then and there to abide orderly and soberly during the time of the common prayer, preachings, or other service of god: on pain of punishment by the censures of the church.* s. 2. On pain of punishment by the censures of the church.

And for the due execution hereof; the king's most excellent majesty, the lords temporal, and all the commons in this present parliament assembled, do in god's name require and charge all the archbishops, bishops, and other ordinaries, that they shall endeavour themselves to the utmost of their knowledges, that the due and true execution thereof may be had throughout their dioceses and charges, as they will answer before god for such evils and plagues wherewith almighty god may justly punish his people, for neglecting this good and wholesome law.

1. 3. 3. By the 1 El. c. 2. *All persons shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour themselves to resort to their parish church or chapel accustomed, or upon reasonable let thereof, to some usual place where common prayer and such service of god shall be used in such time of let, upon every sunday, and other days ordained and used to be kept as holidays, and then and there to abide orderly and soberly, during the time of the common prayer, preaching, or other service of god there to be used and ministred; on pain of punishment by the censures of the church, and also upon pain that every person so offending shall forfeit for every such offence 12 d, to be levied by the churchwardens of the parish where such offence shall be done, to the use of the poor of the same parish, of the goods and lands of such offender, by way of distress.* s. 14. On pain of 12 d a funday.

All persons] Females covert as well as others. *Gibf. 291.*

Except dissenters qualified by the act of toleration, who resort to some congregation of religious worship allowed by that act. *1 W. c. 18. s. 2, 16.*

But they who repair to no place of publick worship, are still punishable as before that act. And if the churchwardens shall happen to present a person, who possibly may go to some other place; the proof thereof rests upon the person presented, and the absence from church justifies the presentment. *Gibf. 964.*

Having no lawful or reasonable excuse] In the case of *Elizabeth Dormer*, an exception was taken to the indictment, because these words were omitted, *not having any lawful or reasonable excuse*; but it was agreed by all, that these words are to come in on the other side, and need not be put into the indictment. *Gibf. 291.*

To their parish church] If one goes to a customary chapel within the parish, it is a good excuse; but this must be pleaded. *Gibf. 292.*

If the plea in the spiritual court be, that this is not his parish church, and they refuse the plea, a prohibition will be granted; because that court cannot intermeddle with the precincts of parishes. *Gibf. 292.*

Or upon reasonable let thereof, to some usual place where common prayer and such service of god shall be used in such time of let] By the common law or practice of the church of England, no person can be duly discharged from attending his own parish church, or warranted in resorting to another, unless he be first duly licensed by his ordinary, who is the proper judge of the reasonableness of his request, and grants him letters of licence under seal, to be exhibited (as there shall be occasion) in proof of his discharge. Which licences are very common in our ecclesiastical records. *Gibf. 291.*

And there to abide orderly and soberly] It is not enough to come, unless he also abide; nor enough to abide when he is come, unless he come so as to be present at the several parts of divine service, and also remain there throughout orderly and soberly; the clause being penned conjunctively, and so the guilt and forfeiture incurred by the violation of any one branch. *Gibf. 292.*

Among the constitutions of Egbert, archbishop of York, one is, that whilst the minister is officiating, if any person shall go out of the church, he shall be excommunicated; and this is taken from a canon of the fourth council of Carthage. *Gibf. 964.*

And all archbishops and bishops, and every of their chancellors, commissaries, archdeacons, and other ordinaries having any peculiar ecclesiastical jurisdiction, shall have power to inquire hereof in their visitation, synods, and elsewhere within their jurisdiction at any other time and place, and to take accusations and informations of all and every the things abovementioned, done committed or perpetrated within the limits of their jurisdictions; and to punish the same by admonition, excommunication, sequestration, or deprivation, and other censures and process, in like form as heretofore hath been used in like cases by the queen's ecclesiastical laws. f. 23.

And the justices of assize shall have power to inquire of, hear and determine the same, at the next assizes; and to make process for execution, as they may do against any person being indicted before them of trespass, or lawfully convicted thereof. And every archbishop and bishop may at his liberty and pleasure, join and associate himself to the justices of assize, for the inquiring of, hearing and determining the same. f. 17, 18, 19.

And all mayors bailiffs and other head officers, of cities boroughs and towns corporate to which justices of assize do not commonly repair, shall have power

to inquire of hear and determine the same yearly, within fifteen days after the feast of Easter and St Michael the archangel; in like manner and form as the justices of assize may do. f. 22.

Also, by the 3 J. c. 4. If any subject of this realm shall not repair every Sunday to some church chapel or usual place appointed for common prayer, and there hear divine service, according to the said statute of the 1 El. c. 2. it shall be lawful for one justice of the peace, on proof to him made by confession or oath of witnesses, to call the party before him; and if he shall not make a sufficient excuse and due proof thereof to the satisfaction of such justice, he shall give warrant to the churchwarden of the parish where the party shall dwell, to levy 12d for every such default by distress and sale; and in default of distress, shall commit him to prison till payment be made: which forfeiture shall be to the use of the poor of the parish where the offender shall be resident at the time of the offence committed. Provided, that no man be impeached upon this clause, except he be called in question for his said default, within one month next after the default made: And that no man being punished according to this branch, shall for the same offence be punished by the forfeiture of 12d. on the statute of the first of Elizabeth. f. 27, 28, 29.

And provided, that whatsoever persons shall for their offences first receive punishment of the ordinary, having a testimonial thereof under the ordinary's seal, shall not for the same offence afterwards be convicted before the justices; and likewise receiving for the said offence punishment first by the justices, shall not for the same offence afterwards receive punishment of the ordinary. 1 El. c. 2. f. 24.

4. By the 23 El. c. 1. f. 5. Every person above the age of sixteen years, On pain of which shall not repair to some church chapel or usual place of common prayer, 20l a month. but forbear the same contrary to the 1 El. c. 2. and be thereof lawfully convicted, shall forfeit to the queen 20l a month.

And there are many regulations concerning the same, by that, and by several subsequent statutes; which being chiefly intended against popish recusants, are more properly treated of under the title **Popery**. And by the toleration act, the same shall not extend to qualified protestant dissenters: but no papist, or popish recusant, shall have any benefit by the said act of toleration.

And by the 23 El. c. 1. Every person which usually on the Sunday shall have in his house divine service which is established by the law of this realm, and be thereat himself usually or most commonly present, and shall not obstinately refuse to come to church; and shall also four times in the year at least be present at the divine service in the church of the parish where he shall be resident, or in some other common church or chapel of ease, shall not incur the said penalty of 20l a month for not repairing to church. f. 12.

5. By the 3 J. c. 5. No recusant ~~convict~~ shall practise law or physick, On pain of nor shall be judge or minister of any court, or bear any military office by land being disabled or sea; and shall forfeit for every offence 100l: and shall also be disabled to from offices. be executor, administrator, or guardian. f. 3, 22.

6. By the 3 J. c. 4. Every person who shall retain in his service, or shall Penalty of relieve, keep, or harbour in his house any servant, sojourner, or stranger, who harbouring shall such recusant.

shall not repair to church, but shall forbear for a month together, not having reasonable excuse, shall forfeit 10*l* for every month he shall continue in his house such person so forbearing: And the justices of the peace in their sessions may bear and determine the same. f. 32, 33, 36.

Recusant conforming.

7. But by the 1 J. c. 4. A recusant conforming himself shall be discharged of all penalties, which he might otherwise sustain by reason of his recusancy. f. 2.

II. Establishment of the book of common prayer.

Power of the church to decree rites and ceremonies.

1. *Art.* 20. The church hath power to decree rites or ceremonies, that are not contrary to god's word.

Art. 34. It is not necessary that traditions and ceremonies be in all places one, or utterly like; for at all times they have been divers, and may be changed according to the diversity of countries, times, and mens manners: so that nothing be ordained against god's word. Whosoever thro' his private judgment, willingly and purposely, doth openly break the traditions and ceremonies of the church, which be not repugnant to the word of god, and be ordained and approved by common authority; ought to be rebuked openly (that other may fear to do the like), as he that offendeth against the common order of the church, and hurteth the authority of the magistrate, and woundeth the consciences of weak brethren. Every particular or national church, hath authority to ordain, change, and abolish ceremonies or rites of the church, ordained only by man's authority; so that all things be done to edifying.

Can. 6. Whoever shall affirm, that the rites and ceremonies of the church of England by law established, are wicked, antichristian, or superstitious; or such as, being commanded by lawful authority, men who are zealously and godly affected may not with any good conscience approve them, use them, or as occasion requireth subscribe unto them: let him be excommunicated ipso facto, and not restored until he repent, and publicly revoke such his wicked errors.

Liturgy before the acts of uniformity.

2. In the more early ages of the church, every bishop had a power to form a liturgy for his own diocese; and if he kept to the analogy of faith and doctrine, all circumstances were left to his own discretion. Afterwards the practice was, for the whole province to follow the service of the metropolitan church; which also became the general rule of the church: And this Lindwood acknowledgeth to be the common law of the church; and intimates, that the use of several services in the same province (as was here in England) was not to be warranted but by long custom. *Gibf.* 259.

The latin services, as they had been used in England before, continued in all king Henry the eighth's reign, without any alteration; save some rasures of collects for the pope, and of the office of Thomas Becket and of some other saints, whose days were by the king's injunctions no more to be observed: but those rasures or deletions were so few, that the old mass books, breviaries, and other ritual's, did still serve without new impressions. *Gibf.* 259.

3. In the second year of king Edward the sixth, a liturgy was established by the statute of the 2 & 3 Ed. 6. c. 1. as followeth: Act of uniformity of the
2 Ed. 6.

Where of long time there hath been had in this realm of England and in Wales, divers forms of common prayer, commonly called the service of the church, that is to say, the use of Sarum, of York, of Bangor, and of Lincoln; and besides the same, now of late much more divers and sundry forms and fashions have been used in the cathedral and parish churches of England and Wales, as well concerning the mattens or morning prayer, and the evensong, as also concerning the holy communion commonly called the mass, with divers and sundry rites and ceremonies concerning the same, and in the administration of other sacraments of the church; and albeit the king, by the advice of his council, hath heretofore divers times assayed to stay innovations or new rites concerning the premisses, yet the same hath not had such good success as his highness required in that behalf; whereupon his highness being pleased to bear with the frailty and weakness of his subjects in that behalf, of his great clemency hath not only been content to abstain from punishment of those that have offended in that behalf, but also to the intent a uniform quiet and godly order should be had concerning the premisses, hath appointed the archbishop of Canterbury and certain other of the most learned and discreet bishops and other learned men of this realm, having respect to the most sincere and pure christian religion taught by the scripture, as to the usages in the primitive church, to draw and make one convenient and meet order rite and fashion of common and open prayer and administration of the sacraments to be had and used in his majesty's realm of England and in Wales; the which, by the aid of the holy ghost, with one uniform agreement is of them concluded, set forth, and delivered in a book, intituled, The book of common prayer and administration of the sacrament and other rites and ceremonies of the church, after the use of the church of England: Wherefore the lords spiritual and temporal and the commons in this present parliament assembled, considering as well the most godly travel of the king's highness herein, as the godly prayers orders rites and ceremonies in the said book mentioned, and the considerations of altering those things which be altered, and retaining those things which be retained in the said book, and also the honour of god, and great quietness which by the grace of god shall ensue upon the one and uniform rite and order in such common prayer and rites and external ceremonies to be used throughout England and Wales, do give to his highness most hearty and lowly thanks for the same, and humbly pray that it may be enacted by his majesty with the assent of the lords and commons in parliament assembled, That all and singular ministers in any cathedral or parish church, or other place within this realm, shall be bounden to say and use the mattens, evensong, celebration of the lord's supper commonly called the mass, and administration of each the sacraments, and all their common and open prayer, in such order and form as is mentioned in the same book, and none other, or otherwise.

And by the same act divers regulations were made, to establish the said book; which are yet in force, not for the establishment of that book, but for the establishment of the present book of common prayer enjoined by the act of uniformity of the 13 & 14 C. 2. and which therefore remain to be inserted in their due course. For, that I may observe

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it once for all; the regulations made by the several acts of uniformity for the establishing of the several respective liturgies, are all brought over and enforced by the last act of uniformity for the establishing of the present book of common prayer, by this clause following, viz.

The several good laws and statutes of this realm, which have been formerly made, and are now in force, for the uniformity of prayer and administration of the sacraments, shall stand in full force and strength to all intents and purposes whatsoever, for the establishing and confirming of the said book herein before mentioned to be joined and annexed to this act, and shall be applied practised and put in ure for the punishing of all offences contrary to the said laws, with relation to the book aforesaid, and no other. 13 & 14 C. 2. c. 4. s. 24.

And by the 3 & 4 Ed. 6. c. 10. *All books called antiphoners, missals, grailes, processions, manuals, legends, pies, portuasses, primers in latin and english, couchers, journals, ordinals, or other books or writings whatsoever heretofore used for the service of the church, written or printed in the english or latin tongue, other than such as shall be set forth by the king's majesty, shall be clearly and utterly abolished, extinguished and forbidden for ever to be used or kept in this realm or elsewhere in any the king's dominions.* s. 1.

And if any person or persons, bodies politick or corporate, that shall have in his or their custody any the books or writings of the sorts aforesaid, and do not before the last day of June next ensuing deliver or cause to be delivered all and every the same books to the mayor bailiff constable or churchwardens of the town where such books then shall be, to be by them delivered over openly within three months next following after the said delivery, to the archbishop bishop chancellor or commissary of the same diocese, to the intent that they cause them immediately after either to be openly burned, or otherwise defaced and destroyed, shall for every such book or books willingly retained in his hands or custody, and not delivered as aforesaid after the said last day of June, and be thereof lawfully convicted, forfeit to the king for the first offence 20 sh, and for the second offence 4 l, and for the third offence shall suffer imprisonment at the king's will. s. 2.

Note, the sense of the foregoing paragraph is evident enough; but it is a little ungrammatically expressed.

And if any mayors bailiffs constables or others, do not within three months after receipt of the same books, deliver or cause to be delivered such books so by them received, to the archbishop bishop chancellor or commissaries of their diocese; and if the said archbishop bishops chancellor or commissaries do not, within forty days after the receipt of such books, burn deface and destroy, or cause to be burned defaced or destroyed the same books, and every of them, they and every of them so offending shall forfeit to the king, being thereof lawfully convicted, 40 l. The one half of all which forfeitures shall be to any of the king's subjects that will sue for the same in any of the king's courts of record. s. 3.

And as well justices of assize in their circuits, as justices of the peace within the limits of their commission in the general sessions, shall have power to inquire of, hear, and determine the same; in such form as they may do in other such like cases. s. 4.

Provided,

Provided, that any person may use keep and have any primers in the english or latin tongue, set forth by king Henry the eighth; so that the sentences of invocation or prayer to saints in the same primers be blotted, or clearly put out of the same. f. 6.

4. Thus stood the liturgy until the 5th year of king Edward the sixth. Act of uniformity of the But because some things were contained in that liturgy, which shewed a mity of the compliance with the superstition of those times, and some exceptions were 5 Ed. 6. taken to it by some learned men at home, and by Calvin abroad, therefore it was reviewed, in which Martin Bucer was consulted, and some alterations were made in it, which consisted in adding the general confession and absolution; and the communion to begin with the ten commandments. The use of oil in confirmation and extreme unction were left out, and also prayers for souls departed, and what tended to a belief of Christ's real presence in the eucharist. And this liturgy so reformed was established by the act of the 5 Ed. 6. as followeth: ——— *Because there hath risen in the use and exercise of the common service in the church heretofore set forth, divers doubts for the fashion and manner of the ministration of the same, rather by the curiosity of the minister and mistakers, than of any other worthy cause; therefore as well for the more plain and manifest explanation thereof, as for the more perfection of the said order or common service, the king with the assent of the lords and commons in parliament assembled, hath caused the aforesaid order of common service, intituled, the book of common prayer, to be faithfully and godly perused explained and made fully perfect, and hath annexed and joined it so explained and perfected to this statute: adding also, a form and manner of making and consecrating of archbishops bishops priests and deacons, to be like force authority and value, as the same like foresaid book intituled the book of common prayer was before; and with the same clauses of provisions and exceptions to all intents and purposes as by the act of the 2 & 3 Ed. 6. c. 1. was limited and expressed for the uniformity of service and administration of the sacraments throughout the realm, upon such several pains as in the said act is expressed. And the said former act to stand in full force and strength to all intents and constructions, and to be applied practised and put in ure to and for the establishing of the book of common prayer now explained and herunto annexed, and also the said form of making archbishops bishops priests and deacons herunto annexed, as it was for the former book.* 5 & 6 Ed. 6. c. 1. f. 5.

This liturgy was abolished by queen Mary; who having called in and destroyed the aforesaid rased books of king Henry the eighth, required all parishes to furnish themselves with new compleat books, and enacted that the service should stand as it was most commonly used in the last year of the reign of the said king Henry the eighth. *Gibf. 259.*

And for a month and more after queen Mary's death, the service continued as before, nothing being forbidden but the elevation; but on the 27th day of December following, queen Elizabeth set forth a proclamation, to charge and command all manner of her subjects, as well those that be called to the ministry of the church, as all others, that they do forbear to preach or teach, or to give audience to any manner of doctrine or preaching, other than to the gospels and epistles, commonly

called the gospel and epistle of the day, and to the ten commandments in the vulgar tongue, without exposition or addition of any manner of sense or meaning to be applied or added; or to use any other manner of publick prayer rite or ceremony in the church, but that which is already used, and by law received, or the common litany used at this present in her majesty's own chapel, and the lord's prayer and the creed in english; until consultation may be had by parliament, by her majesty and her three estates of this realm, for the better conciliation and accord of such causes, as at this present are moved in matters and ceremonies of religion. *Gibf. 267, 268.*

Act of uniformity of the 1 Eliz.

5. After which, in the first year of the same queen, a liturgy was established by act of parliament of the 1 El. c. 2. in this wise: — *Be it enacted, by the queen's highness, with the assent of the lords and commons in this present parliament assembled, that all ministers in any cathedral or parish church or other place, shall be bounden to say and use the mattens, evensong, celebration of the lord's supper, and administration of each of the sacraments, and all the common and open prayer, in such order and form as is mentioned in the book authorized by parliament in the 5 & 6 Ed. 6. with one alteration or addition of certain lessons to be used on every sunday in the year, and the form of the litany altered and corrected, and two sentences only added in the delivery of the sacrament to the communicants, and none other or otherwise. And there was a proviso, that such ornaments of the church, and of the ministers thereof, shall be retained and used, as was in this church of England by authority of parliament in the second year of the reign of king Edward the sixth, until other order shall be taken therein by the authority of the queen's majesty, with the advice of her commissioners appointed and authorized under the great seal of England for causes ecclesiastical, or of the metropolitan of this realm.*

Of the lords and commons] It was not said *lords spiritual*, in this or either of the former acts; because all the bishops present dissented. *Gibf. 268.*

The form of the litany altered and corrected] By the omission of the clause, *from the tyranny of the bishop of Rome and all his detestable enormities*; which had been in the 2d and in the 5th of Ed. 6. *Gibf. 268.*

Two sentences only added in the delivery of the sacraments] Of the two forms now used at the delivering of the bread and wine, the first part of each (to the word *life* inclusive) was in the book of the second year of king Edward the sixth, but not the second part; but in the book of the fifth year, was the second part without the first: and the alteration made by virtue of this act, was the inserting of both as they now stand. *Gibf. 268.*

Order shall be taken by authority of the queen's majesty, with the advice of her commissioners] Two years afterwards, by virtue of this clause, the queen issued her commission to the archbishop and three others to peruse the order of the lessons throughout the whole year, and to cause some new calendars to be imprinted; which were finished and sent to the several bishops to see them observed in their dioceses in the month of February 1560. *Gibf. 268.*

By

By Can. 36. of the canons in 1603; *No person shall be received into the ministry, nor admitted to any ecclesiastical living, nor suffered to preach, to catechize, or be a lecturer or reader of divinity in any place; except he shall first subscribe (amongst others) to this article following; That the book of common prayer, and of ordering of bishops priests and deacons, containeth in it nothing contrary to the word of god, and that it may be lawfully used, and that he himself will use the form in the said book prescribed, in publick prayer and administration of the sacraments, "and none other."*

And by Can. 56. of the same canons; *Every minister, being possessed of a benefice that hath cure and charge of souls, altho' he chiefly attend to preaching, and hath a curate under him to execute the other duties which are to be performed for him in the church, and likewise every other stipendiary preacher that readeth any lecture, or catechizeth, or preacheth in any church or chapel, shall twice at the least every year read himself the divine service upon two severall sundays publickly and at the usual times, both in the forenoon and afternoon in the church which he so possesseth, or where he readeth catechizeth or preacheth as is aforesaid, and shall likewise as often in every year administer the sacraments of baptism (if there be any to be baptized), and of the lord's supper, in such manner and form, and with the observation of all such rites and ceremonies as are prescribed by the book of common prayer in that behalf: which if he do not accordingly perform, then shall he that is possessed of a benefice (as before) be suspended; and he that is but a reader preacher or catechizer, be removed from his place by the bishop of the diocese; until he or they shall submit themselves to perform all the said duties, in such manner and sort as before is prescribed.*

After the passing of these canons, king James in the first year of his reign, by virtue of the aforesaid proviso in the 1 *El. c. 2.* upon the conference held before the king himself at Hampton court, gave directions to the archbishop and other high commissioners, to review the common prayer book; and they did make severall material alterations and enlargements of it, as in the office of private baptism, and in severall rubricks and other passages, and added five or six new prayers and thanksgivings, and all that part of the catechism which contains the doctrine of the sacraments. And yet the powers specified in that proviso, seem not to extend to the queen's heirs and successors, but to be only lodged personally in the queen; yet the book of common prayer so altered stood in force from the first year of king James, to the fourteenth of Charles the second. *Watf. c. 31.*

And it is to be observed, that the liturgy of the 13 & 14 *C. 2.* is not the same with that which the aforesaid canons do refer to; so that so far forth the said canons as to this matter are not now in force.

6. In the preface to the book of common prayer, concerning the service of the church (which was also nearly the same in the 2d and in the 13th of *Ed. 6:*) ——— *There was never any thing by the wit of man so well devised, or so sure established, which in continuance of time hath not been corrupted; as, among other things, it may plainly appear by the common prayers*

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in the church, commonly called divine service. The first original and ground whereof, if a man would search out by the ancient fathers, he shall find that the same was not ordained but of a good purpose, and for a great advancement of godliness. For they so ordered the matter, that all the whole bible (or the greatest part thereof) should be read over once every year; intending thereby, that the clergy, and especially such as were ministers in the congregation, should by often reading and meditation in god's word, be stirred up to godliness themselves, and be more able to exhort others by wholesome doctrine, and to confute them that were adversaries to the truth; and further, that the people, by daily hearing of holy scripture read in the church, might continually profit more and more in the knowledge of god, and be the more inflamed with the love of his true religion.

But these many years passed, this godly and decent order of the ancient fathers hath been so altered, broken and neglected, by planting-in uncertain stories and legends, with multitude of responds, verses, vain repetitions, commemorations, and synodals; that commonly, when any book of the bible was begun, after three or four chapters were read out, all the rest were unread. And in this sort the book of Isaiah was begun in advent, and the book of Genesis in septuagesima; but they were only begun, and never read through; after like sort were other books of holy scripture used. And moreover, whereas St Paul would have such language spoken to the people in the church, as they might understand and have profit by hearing the same; the service in this church of England these many years hath been read in latin to the people, which they understand not; so that they have heard with their ears only, and their heart spirit and mind have not been edified thereby. And furthermore, notwithstanding that the ancient fathers have divided the psalms into seven portions, whereof every one was called a nocturn; now of late time, a few of them have been daily said, and the rest utterly omitted. Moreover, the number and hardness of the rules called the pie, and the manifold changings of the service, was the cause that to turn to the book only was so hard and intricate a matter, that many times there was more business to find out what should be read, than to read it when it was found out.

These inconveniences therefore considered, here is set forth such an order, whereby the same may be redressed. And for a readiness in this matter, here is drawn out a kalendar for that purpose, which is plain and easy to be understood; whereof (so much as may be) the reading of holy scripture is so set forth, that all things shall be done in order, without breaking one piece from another. For this cause be cut off anthems, responds, invitatories, and such like things, as did break the continual course of the reading of the scripture.

Yet because there is no remedy, but that of necessity there must be some rules; therefore certain rules are here set forth: which as they are few in number, so they are plain and easy to be understood. So that here you have an order for prayer, and for the reading of the holy scripture, much agreeable to the mind and purpose of the old fathers, and a great deal more profitable and commodious, than that which of late was used. It is more profitable, because here are left out many things, whereof some are untrue, some uncertain, some vain and superstitious, and nothing is ordained to be read but the very pure word of god, the holy scriptures, or that
which

which is agreeable to the same; and that in such a language and order, as is most easy and plain for the understanding both of the readers and hearers. It is also more commodious, both for the shortness thereof, and for the plainness of the order, and for that the rules be few and easy.

And forasmuch as nothing can be so plainly set forth, but doubts may arise in the use and practice of the same; to appease all such diversity (if any arise) and for the resolution of all doubts, concerning the manner how to understand do and execute the things contained in this book; the parties that so doubt, or diversely take any thing, shall alway resort to the bishop of the diocese, who by his discretion shall take order for the quieting and appeasing of the same; so that the same order be not contrary to any thing contained in this book. And if the bishop of the diocese be in doubt, he may send for the resolution thereof to the archbishop.

And altho' it be appointed, that all things shall be read and sung in the church in the english tongue, to the end that the congregation may be thereby edified; yet it is not meant, but that when men say morning and evening prayer privately, they may say the same in any language that they themselves do understand.

Stories and legends] That is, concerning the lives of the saints; of whom there being such a number in the church of Rome, few days are free from the stories and legends they relate of them. *Gibf. 263.*

Responds] A short anthem sung, after reading three or four verses of a chapter; after which, the chapter proceeds. *Id.*

Commemorations] The service of a lesser holiday falling in with a greater. *Id.*

Synodals] Constitutions made in provincial or diocesan synods, and published in the parish churches. *Id.*

Nocturn] So called from the ancient christians rising in the Night to perform them. *Id.*

Pie] A table to find out the service belonging to each day; which becomes very difficult, by the coincidence of many offices on the same day. *Id.*

Invitatories] Some text of scripture, adapted and chosen for the occasion of the day, and used before the *venite*; which also it self is called the invitatory psalm. *Id.*

In the english tongue] By *Art. 24.* It is a thing plainly repugnant to the word of god, and the custom of the primitive church, to have publick prayer in the church, or to minister the sacraments, in a tongue not understood of the people.

And by the 2 & 3 *Ed. 6. c. 1.* it is provided, that it shall be lawful to any man that understandeth the greek, latin, and hebrew tongue, or other strange tongue, to say and have the prayers of mattens and evensong in latin or any such other tongue, saying the same privately, as they do understand: *f. 5.*

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And for the encouragement of learning in the tongues, in the universities of Cambridge and Oxford; to use and exercise in their common an open prayer in their chapels (being no parish churches) or other places of prayer, the mattens, evensong, letany, and all other prayers (the holy communion commonly called the mass excepted) prescribed in the said book, in greek, latin, or hebrew. *f. 6.*

And by the 13 & 14 C. 2. c. 4. it is provided, that it shall be lawful to use the morning and evening prayer, and all other prayers and service prescribed in and by the said book, in the chapels or other publick places of the respective colleges and halls in both the universities, in the colleges of Westminster Winchester and Eaton, and in the convocations of the clergeries of either province, in latin. *f. 18.*

And by the same statute, the bishops of Hereford, St David's, Asaph, Bangor, and Landaff, and their successors, shall take order that the said book be translated into the british or welsh tongue, to be used in Wales where the welsh tongue is commonly used; and at the same time an english book shall be had there likewise, that such as understand the same may have recourse thereunto, and such as do not understand the same may by conferring both tongues together the sooner attain to the knowledge of the english tongue. *f. 27.*

And by the 5 *El.* c. 28. The bishops are in like manner required to cause the old and new testament to be translated into welsh, and to have one english and one welsh copy in every such respective place.

By the 13 & 14 C. 2. c. 4. (which is the last act of uniformity) it is enacted as follows: *Whereas by the neglect of ministers in using the order of common prayer, during the time of the late troubles, great mischiefs and inconveniences have arisen; for the prevention thereof in time to come, and for settling the peace of the church, the king (according to his declaration of the five and twentieth of October 1660) granted his commission under the great seal, to several bishops and other divines, to review the book of common prayer, and to prepare such alterations and additions as they thought fit to offer: And afterwards, the convocations of both the provinces being by his majesty called and assembled, his majesty hath been pleased to authorize and require the presidents of the said convocation, and other the bishops and clergy of the same, to review the said book of common prayer, and the book of the form and manner of the making and consecrating of bishops priests and deacons; and that after mature consideration, they should make such additions and alterations in the said books respectively, as to them should seem meet and convenient, and should exhibit and present the same to his majesty in writing, for his further allowance or confirmation: since which time, they the said presidents bishops and clergy of both provinces have accordingly reviewed the said books, and have made some alterations to the same which they think fit to be inserted, and some additional prayers to the said book of common prayer to be used upon proper and emergent occasions; and have exhibited and presented the same unto his majesty in writing in one book, intituled, The book of common prayer and administration of the sacraments and other rites and ceremonies of the church, according to the use of the church of England, together with the psalter*

or psalms of David pointed as they are to be sung or said in churches, and the form and manner of making ordaining and consecrating of bishops priests and deacons: *All which his majesty having duly considered, hath fully approved and allowed the same, and recommended to this present parliament, that the said books of common prayer and of the form of ordination and consecration of bishops priests and deacons, with the alterations and additions which have been so made and presented to his majesty by the said convocations, be the book which shall be appointed to be used by all that officiate in all cathedral and collegiate churches and chapels, and in all chapels of colleges and halls in both the universities and the colleges of Eaton and Winchester, and in all parish churches and chapels throughout the kingdom, and by all that make or consecrate bishops priests or deacons in any of the said places, under such sanctions and penalties as the houses of parliament shall think fit:* f. 1.

Now in regard that nothing conduceth more to the settling of the peace of the nation, nor to the honour of our religion and the propagation thereof, than an universal agreement in the publick worship of god; and to the intent that every person within this realm may certainly know the rule to which he is to conform, in publick worship and administration of sacraments and other rites and ceremonies of the church of England, and the manner how and by whom bishops priests and deacons are and ought to be made ordained and consecrated; be it enacted by the king's most excellent majesty, by the advice and consent of the lords spiritual and temporal and of the commons in this present parliament assembled, That all and singular ministers in any cathedral, collegiate, or parish church or chapel, or other place of publick worship, shall be bound to say and use the morning prayer, evening prayer, celebration and administration of both the sacraments, and all other the publick and common prayer, in such order and form as is mentioned in the said book, intituled as aforesaid, and annexed and joined to this present act; and that the morning and evening prayers therein contained, shall upon every lord's day, and upon all other days and occasions, and at the the times therein appointed, be openly and solemnly read by all and every minister or curate, in every church chapel or other place of publick worship as aforesaid. f. 2.

Granted his commission under the great seal] Which bore date Mar. 25. 1661. and was directed to twelve bishops and twelve presbyterian divines, with nine assistants on each side, to supply the places of the principals, when they should be occasionally absent. In virtue of which commission, the commissioners met frequently at the Savoy, and disputations were held, but nothing concluded. Gibs. 275.

Or other place of publick worship] By the 22 G. 2. c. 33. All commanders, captains, and officers at sea, shall cause the publick worship of almighty god, according to the liturgy of the church of England, to be performed in their respective ships; and prayers and preachings by the chaplains shall be performed diligently. Art. 1.

And by the rubrick before the service at sea: The morning and evening service to be used daily at sea, shall be the same which is appointed in the book of common prayer.

In such order and form as is mentioned in the said book] Provided, that in all those prayers, litanies, and collects, which do any way relate to the king, queen, or royal progeny; the names be altered and changed from time to time, and fitted to the present occasion, according to the direction of lawful authority. 13 & 14 C. 2. c. 4. f. 25. That is, (according to practice,) of the king or queen in council. *Gibf.* 280.

Books of common prayer to be provided.

7. By the 1 *El.* c. 2. The book of common prayer shall be provided at the charges of the parishioners of every parish and cathedral church. *f.* 19.

This was intended of the book of common prayer, as then established by that act.

By *Can.* 80. The churchwardens or questmen of every church and chapel shall, at the charge of the parish, provide the book of common prayer, lately explained in some few points by his majesty's authority, according to the laws and his highness's prerogative in that behalf; and that with all convenient speed, but at the furthest within two months after the publishing of these our constitutions.

And this was intended of the same book of common prayer, as altered in the conference at Hampton court as afore said.

Finally, by the 13 & 14 C. 2. c. 4. A true printed copy of the (present) book of common prayer, shall at the costs and charges of the parishioners of every parish-church and chapelry, cathedral church, college and hall, be provided before the feast of St Bartholomew 1662; on pain of 3l a month, for so long time as they shall be unprovided thereof. *f.* 26.

And the respective deans and chapters of every cathedral or collegiate church were required at their proper costs and charges, before Dec. 25. 1662, to obtain under the great seal of England, a true and perfect printed copy of this act, and of the said book annexed hereunto, to be by the said deans and chapters and their successors kept and preserved in safety for ever, and to be also produced and shewed forth in any court of record as often as they shall be thereunto lawfully required; and also there shall be delivered true and perfect copies of this act and of the same book into the respective courts at Westminster, and into the tower of London, to be kept and preserved for ever among the records of the said courts, and the records of the tower, to be also produced and shewed forth in any court, as need shall require; which said books so to be exemplified under the great seal of England, shall be examined by such persons as the king shall appoint under the great seal of England for that purpose, and shall be compared with the original book hereunto annexed, and they shall have power to correct and amend in writing any error committed by the printer in the printing of the same book, and shall certify in writing under their hands and seals, or the hands and seals of any three of them, at the end of the same book, that they have examined and compared the same book, and find it to be a true and perfect copy; which said books so exemplified under the great seal, shall be deemed to be good and available

able in the law to all intents and purposes, and shall be accounted as good records as this book it self hereunto annexed. *f.* 28.

8. By the 13 & 14 C. 2. c. 4. Every person who shall be presented or collated or put into any ecclesiastical benefice or promotion, shall in the church chapel or place of publick worship belonging to the same, within two months next after that he shall be in the actual possession of the said ecclesiastical benefice or promotion, upon some lord's day, openly publicly and solemnly read the morning and evening prayers, appointed to be read by and according to the said book of common prayer, at the times thereby appointed or to be appointed; and after such reading thereof, shall openly and publicly before the congregation there assembled, declare his unfeigned assent and consent to the use of all things therein contained and prescribed, in these words and no other: "I A. B. do here declare my unfeigned assent and consent to all and every thing contained and prescribed in and by the book, intituled, The book of common prayer and administration of the sacraments and other rites and ceremonies of the church, according to the use of the church of England; together with the psalter or psalms of David, pointed as they are to be sung or said in churches; and the form or manner of making ordaining and consecrating of bishops priests and deacons." And every such person, who shall (without some lawful impediment to be allowed and approved by the ordinary of the place) neglect or refuse to do the same within the time aforesaid (or in case of such impediment, within one month after such impediment removed), shall ipso facto be deprived of all his said ecclesiastical benefices and promotions; and the patron shall present or collate as if he were dead. *f.* 6.

And every person who shall be appointed or received as a lecturer, to preach upon any day of the week, in any church chapel or place of publick worship, the first time he preacheth (before his sermon) shall openly publicly and solemnly read the common prayers and service appointed to be read for that time of the day, and then and there publicly and openly declare his assent unto and approbation of the said book, and to the use of all the prayers rites and ceremonies forms and orders therein contained, according to the form before appointed in this act: and shall upon the first lecture day of every month afterwards, so long as he continues lecturer or preacher there, at the place appointed for his said lecture or sermon, before his said lecture or sermon, openly publicly and solemnly read the common prayers and service for that time of the day, and after such reading thereof shall openly and publicly before the congregation there assembled declare his unfeigned assent unto the said book, according the form aforesaid: and every such person who shall neglect or refuse to do the same, shall from thenceforth be disabled to preach the said or any other lecture or sermon in the said or any other church chapel or place of publick worship, until he shall openly publicly and solemnly read the common prayers and service appointed by the said book, and conform in all points to the things therein prescribed, according to the purport and true intent of this act. Provided, that if the said lecture be to be read in any cathedral or collegiate church or chapel;

it shall be sufficient for the said lecturer, openly at the time aforesaid, to declare his assent and consent to all things contained in the said book, according to the form aforesaid. And if any person who is by this act disabled (or prohibited, 15 C. 2. c. 6. f. 7.) to preach any lecture or sermon, shall during the time that he shall continue so disabled (or prohibited), preach any sermon or lecture; he shall suffer three months imprisonment in the common gaol: and any two justices of the peace of any county within this realm, and the mayor or other chief magistrate of any city or town corporate within the same, upon certificate from the ordinary made to him or them of the offence committed, shall and are hereby required to commit the person so offending to the gaol of the same county city or town corporate. Provided, that at all times when any sermon or lecture is to be preached; the common prayers and service in and by the said book appointed to be read for that time of the day, shall be openly publickly and solemnly read by some priest or deacon, in the church chapel or place of publick worship where the said sermon or lecture is to be preached, before such sermon or lecture be preached, and that the lecturer then to preach shall be present at the reading thereof. And provided, that this act shall not extend to the university churches, when any sermon or lecture is preached there as and for the university sermon or lecture; but the same may be preached or read in such sort and manner, as the same have been heretofore preached or read. f. 19, 20, 21, 22, 23.

Subscription
and declara-
tion of con-
formity.

9. Every dean canon and prebendary of every cathedral or collegiate church, and all masters and other head fellows chaplains and tutors of or in any college hall house of learning or hospital, and every publick professor and reader in either of the universities and in every college elsewhere, and every parson vicar curate lecturer and every other person in holy orders, and every schoolmaster keeping any publick or private school and every person instructing or teaching any youth in any house or private family as a tutor or schoolmaster, who shall be incumbent or have possession of any deanry canonry prebend masterhip headship fellowship professor's-place or reader's-place parsonage vicarage or any other ecclesiastical dignity or promotion or of any curate's-place, lecture or school or shall instruct or teach any youth as tutor or schoolmaster, shall at or before his admission to be incumbent or having possession aforesaid subscribe the declaration following; "I A. B. do declare, " that I will conform to the liturgy of the church of England, as " it is now by law established." 13 & 14 C. 2. c. 4. f. 8. 1 W. sess. 1. c. 8. f. 11.

Which said declaration shall be subscribed by every of the said masters and other heads fellows chaplains and tutors of or in any college hall or house of learning, and by every publick professor and reader in either of the universities, before the vicechancellor or his deputy; and by every other of the said persons before the archbishop bishop or ordinary of the diocese (or his vicar-general chancellor or commissary, 15 C. 2. c. 6. f. 5): on pain of forfeiting such office place promotion or dignity, and being utterly disabled and ipso facto deprived of the same; which shall be

be void, as if such person failing were naturally dead. 13 & 14 C. 2. c. 4. §. 10.

And if any schoolmaster or other person instructing or teaching youth in any private house or family as a tutor or schoolmaster shall instruct or teach any youth as a tutor or schoolmaster before such subscription; he shall for the first offence suffer three months imprisonment, and for the second and every other offence shall suffer three months imprisonment and also forfeit 5*l* to the king. §. 11.

And after such subscription made, every such parson vicar curate and lecturer shall procure a certificate under the hand and seal of the respective archbishop bishop or ordinary of the diocese (who shall make and deliver the same upon demand); and shall publickly and openly read the same, together with the said declaration, upon some lord's day within three months then next following, in his parish church where he is to officiate, in the presence of the congregation there assembled, in the time of divine service: upon pain that every person failing therein (without some lawful impediment to be allowed and approved by the ordinary of the place, 23 G. 2. c. 28.) shall lose such place respectively and be disabled and ipso facto deprived thereof, and the same shall be void as if he were naturally dead. §. 11.

Provided, that the penalties in this act shall not extend to the foreigners or aliens of the foreign reformed churches, allowed by the king his heirs and successors in England. §. 15.

Provided, that no title to confer or present by lapse shall accrue by any avoidance or deprivation ipso facto by virtue of this statute, but after six months notice of such avoidance or deprivation given by the ordinary to the patron, or such sentence of deprivation openly and publickly read in the parish church of the benefice parsonage or vicarage becoming void, or whereof the incumbent shall be deprived by virtue of this act. §. 16.

And no form or order of common prayers administration of sacraments rites or ceremonies shall be openly used in any church chapel or other publick place of or in any college or hall in either of the universities, or of the colleges of Westminster Winchester or Eaton, other than what is prescribed by the said book; and every governor or head of any of the said colleges or halls, shall within one month next after his election or collation and admission into the same government or headship, openly and publickly in the church chapel or other publick place of the same college or hall, and in the presence of the fellows and scholars of the same or the greater part of them then resident, subscribe unto the said book, and declare his unfeigned assent and consent thereunto, and to the use of all the prayers rites and ceremonies forms and orders therein prescribed and contained, according to the form aforesaid: and all such governors or heads of the said colleges and halls as shall be in holy orders, shall once at least in every quarter of the year (not having a lawful impediment) openly and publickly read the morning prayer and service in and by the said book appointed to be read in the church chapel or other publick place of the same college or hall; on pain to lose and be suspended from all the benefits and profits belonging to the same government or headship.

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ship, by the space of six months, by the visitor or visitors of the same college or hall: and if such governor or head so suspended for not subscribing to the said book, or for not reading of the morning prayer and service as aforesaid, shall not at or before the end of six months next after such suspension subscribe unto the said book and declare his consent thereto as aforesaid, or read the morning prayer and service as aforesaid, then such government or headship shall be ipso facto void. f. 17.

Provided, that in the same colleges and halls as aforesaid, the said service as aforesaid may be used in latin. f. 18.

Provided also, that nothing in this act shall be prejudicial to the king's professor of the law within the university of Oxford, for or concerning the prebend of Shipton within the cathedral church of Sarum, united and annexed unto the place of the same king's professor for the time being by the late king James of blessed memory. f. 29.

Penalty of
contemning
or not using
the same.

10. By *Can. 4.* Whosoever shall affirm, that the form of god's worship in the church of England, established by law, and contained in the book of common prayer and administration of sacraments, is a corrupt superstitious or unlawful worship of god, or containeth any thing in it that is repugnant to the scriptures; let him be excommunicated ipso facto, and not restored but by the bishop of the place, or archbishop, after his repentance and publick revocation of such his wicked errors.

By *Can. 38.* If any minister, after he hath subscribed to the book of common prayer, shall omit to use the form of prayer, or any of the orders or ceremonies prescribed in the communion book, let him be suspended; and if after a month he do not reform and submit himself, let him be excommunicated; and then if he shall not submit himself within the space of another month, let him be deposed from the ministry.

And by *Can. 98.* After any judge ecclesiastical hath pronounced judicially against contemners of ceremonies, for not observing the rites and orders of the church of England, or for contempt of publick prayer; no judge *ad quem* shall allow of his appeal, unless the party appellant do first personally promise and avow, that he will faithfully keep and observe all the rites and ceremonies of the church of England, as also the prescript form of common prayer, and do likewise subscribe to the same.

By the 13 & 14 C. 2. c. 4. In all places where the proper incumbent of any parsonage or vicarage or benefice with cure, doth reside on his living, and keep a curate; the incumbent himself in person (not having some lawful impediment to be allowed by the ordinary of the place) shall once at the least in every month openly and publickly read the common prayers and service in and by the said book prescribed, and (if there be occasion) administer each of the sacraments and other rites of the church, in the parish church or chapel belonging to the same, in such order manner and form as in and by the said book is appointed: on pain of 5*l* to the use of the poor of the parish for every offence, upon conviction by confession or oath of two witnesses, before two justices of the peace; and in default of payment within ten days, to be levied by distress and sale by

by warrant of the said justices, by the churchwardens or overseers of the poor of the said parish. f. 7.

By the 2 & 3 Ed. 6. c. 1. and 1 El. c. 2. it is enacted as followeth: If any parson vicar or other whatsoever minister, that ought or should sing or say common prayer mentioned in the said book, or minister the sacraments, refuse to use the said common prayers or to minister the sacraments in such cathedral or parish church, or other places as he should use to minister the same, in such order and form as they be mentioned and set forth in the said book; or shall wilfully or obstinately, standing in the same, use any other rite ceremony order form or manner of celebrating the lord's supper, openly or privily, or mattens, evensong, administration of the sacraments, or other open prayer than is mentioned and set forth in the said book; or shall preach, declare, or speak any thing in the derogation or depraving of the said book, or any thing therein contained, or of any part thereof: and shall be thereof lawfully convicted, according to the laws of this realm, by verdict of twelve men, or by his own confession, or by the notorious evidence of the fact, he shall forfeit to the king (if the prosecution is on the statute of the 2 & 3 Ed. 6.) for his first offence the profit of such one of his spiritual benefices or promotions as it shall please the king to appoint, coming or arising in one whole year after his conviction, and also be imprisoned for six months; and for his second offence be imprisoned for a year, and be deprived ipso facto of all his spiritual promotions, and the patron shall present to the same as if he were dead; and for the third offence shall be imprisoned during life: and if he shall not have any spiritual promotion, he shall for the first offence suffer imprisonment six months, and for the second offence imprisonment during life. And if the prosecution is on the statute of the 1 El. c. 2. then he shall forfeit to the king for the first offence the profit of all his spiritual promotions for one year, and be imprisoned for six months; for the second offence shall be imprisoned for a year, and be deprived ipso facto of all his spiritual promotions, and the patron shall present as if he were dead; and for the third offence shall be deprived ipso facto of all his spiritual promotions, and be imprisoned during life: and if he have no spiritual promotion, he shall for the first offence be imprisoned for a year, and for the second offence during life.

And by the said statutes, If any person shall in any interludes, plays, songs, rhymes, or by other open words, declare or speak any thing in the derogation depraving or despising of the same book, or of any thing therein contained, or any part thereof; or shall by open fact, deed, or by open threatenings compel or cause, or otherwise procure or maintain any parson vicar or other minister in any cathedral or parish church, or chapel, or in any other place, to sing or say any common or open prayer, or to minister any sacrament otherwise, or in any other manner and form than is mentioned in the said book; or by any of the said means shall unlawfully interrupt or let any parson vicar or other minister, in any cathedral or parish church chapel or any other place, to sing or say common and open prayer, or to minister the sacraments or any of them, in such manner and form as is mentioned in the said book; every such person, being thereof lawfully convicted in form aforesaid, shall (if the prosecution is on the statute of the 2 & 3 Ed. 6.) forfeit to the king for the first offence 10l, for the second offence 20l, for the third offence shall

forfeit all his goods and be imprisoned during life: and if for the first offence he do not pay the 10*l* within six weeks after his conviction, he shall instead of the said 10*l* be imprisoned for three months; and if for the second offence he do not pay the said sum of 20*l* within six weeks after his conviction, he shall instead of the said 20*l* be imprisoned for six months. And if the prosecution is on the statute of the 1 El. c. 2. then he shall forfeit to the king for the first offence 100 marks, for the second offence 400 marks, for the third offence shall forfeit all his goods and be imprisoned during life: and if he do not pay the sum for the first offence within six weeks next after his conviction, he shall instead thereof be imprisoned for six months; and if he do not pay the sum for the second offence within six weeks next after his conviction, he shall instead thereof be imprisoned for twelve months.

And the justices of assize shall have power to inquire of hear and determine all offences contrary to the said acts, and to make process for the execution of the same, as they may do against any person being indicted before them of trespass, or lawfully convicted thereof. Provided, that every archbishop and bishop may at his liberty and pleasure associate himself to the said justices of assize, for the inquiring of hearing and determining the same.

But no person shall be molested for any offence against these acts, unless he be indicted thereof at the next assizes.

And lords of parliament for the said offences on the 2 & 3 Ed. 6. to be tried by their peers. But if the prosecution is on the 1 El. c. 2. then they shall only for the third offence be tried by their peers.

And all mayors bailiffs and other head officers of cities boroughs or towns corporate, to which justices of assize do not commonly repair, shall have power to inquire of hear and determine offences against these acts within fifteen days after the feast of Easter and St Michael the archangel yearly, as the justices of assize may do.

Provided, that all archbishops and bishops, and every of their chancellors, commissaries, archdeacons, and other ordinaries having any peculiar ecclesiastical jurisdiction, shall have power by virtue of these acts, as well to inquire in their visitations, synods, and elsewhere within their jurisdiction, at any other time and place, to take accusations and informations of all and every the things abovementioned done or committed within the limits of their jurisdiction, and to punish the same by admonition, excommunication, sequestration, or deprivation, and other censures and process, in like form as heretofore hath been used in like cases by the king's ecclesiastical laws. And for their authority in this behalf, all and singular the same archbishops bishops and other their officers exercising ecclesiastical jurisdiction as well in places exempt as not exempt within their diocese, shall have full power and authority to reform correct and punish by censures of the church, all and singular the said offenders within any their jurisdictions or diocese; any other law, statute, privilege, liberty or provision heretofore made had or suffered to the contrary notwithstanding. Provided, that whatsoever persons shall for their offences first receive punishment of the ordinary, having a testimonial thereof under the ordinary's seal, shall not for the same offence eschoons be convicted before the justices; and likewise receiving for the said offence punishment first by the justices, shall not for the same offence eschoons receive punishment of the ordinary.

If any parson, vicar, or other whatsoever minister] Popish priests, as well as others; for in an action hereupon, in the 3 *El.* brought against a popish priest for saying mass, it was held by the whole court, that he was within the purview of the statute of the 1 *El.* it appearing clearly by the next clause thereof, that the design of the parliament was, to abolish the superstitious service, and to establish the new service in its place. *Dyer* 203.

Use any other rite] In the 26 & 27 *El.* Fleming was indicted upon this statute of the 1 *El.* and punished; because he had given the sacrament of baptism in other form than is here prescribed. 1 *Leon.* 295.

E. 1 Jac. 2. An indictment for using *other prayers*, and *in other manner*, seems to have been judged insufficient, because the prayers used may be upon some extraordinary occasion, and so no crime: and it was said, that the indictment ought to have alledged, that the defendant used other forms and prayers *instead* of those enjoined, which were neglected by him; for otherwise every parson may be indicted that useth prayers before his sermon, other than such which are required by the book of common prayer. 3 *Mod.* 79.

Or other open prayer] By the said acts, *open prayer* in and throughout the same, meaneth that prayer which is for others to come unto, or hear, either in common churchers, or private chapels or oratories, commonly called the service of the church.

Shall forfeit] A clerk was indicted hereupon, for using other prayers, and was fined 100 marks; and it was held by the whole court to be ill: because they can inflict no other punishment than what is directed by the statute. 3 *Mod.* 79.

All archbishops and bishops] If a minister preach against the book of common prayer, this is a good cause of deprivation by the ecclesiastical law without aid of the said statutes: for he that speaketh against the peace and quiet of the church, is not worthy to be a governor of the church. And the statutes being in the affirmative, do not take away the ordinary's power of depriving for the first offence: on the contrary, there is an express proviso, which reserveth to him his power. 2 *Roll's Abr.* 222.

H. 33 El. Robert Caudrey, clerk, was deprived of his benefice before the high commissioners, as well for that he had preached against the book of common prayer, as also for that he refused to celebrate divine service according to the said book; which deprivation, tho' not prescribed by the statutes for the first offence, was declared to be good; because the ecclesiastical judge might lawfully inflict such sentence before the making of these statutes, and is not inhibited (on the contrary his ancient power is reserved) by the same statutes. *Gibb.* 268. 5 *Co.* Caudrey's case.

11. By the 5 & 6 *Ed. 6. c. 1.* *If any person shall willingly and wil- Penalty of -*
tingly bear and be present at any other manner or form of common prayer or being present
administration of the sacraments, or of making ministers in the church, or of at any other.
any other rites contained in the book of common prayer, than is mentioned and
set forth in the said book [except persons qualified by the act of toleration

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as before is mentioned], and shall be thereof convicted according to the laws of this realm, before the justices of assize or justices of the peace in their sessions, by the verdict of twelve men, or by confession, or otherwise; he shall for the first offence suffer imprisonment for six months, for the second offence imprisonment for a year, and for the third offence imprisonment during life. s. 6.

III. Orderly behaviour during the divine service.

By the canons.

1. Can. 18. No man shall cover his head in the church or chapel in the time of divine service, except he have some infirmity; in which case let him wear a night cap, or coif. All manner of persons then present shall reverently kneel upon their knees, when the general confession, litany, or other prayers are read; and shall stand up at the saying of the belief, according to the rules in that behalf prescribed in the book of common prayer. And likewise when in time of divine service the lord Jesus shall be mentioned, due and lowly reverence shall be done by all persons present, as it hath been accustomed, testifying by these outward ceremonies and gestures their inward humility, christian resolution, and due acknowledgment that the lord Jesus Christ, the true eternal son of god, is the only saviour of the world, in whom alone all the mercies, graces and promises of god to mankind, for this life and the life to come, are fully and wholly comprized. And none, either man or woman or child, of what calling soever, shall be otherwise at such times busied in the church, than in quiet attendance to hear mark and understand that which is read preached or ministred; saying in their due places audibly with the minister, the confession, the lord's prayer, and the creed; and making such other answers to the publick prayers, as are appointed in the book of common prayer: neither shall they disturb the service or sermon, by walking, or talking, or any other way; nor depart out of the church during the time of divine service or sermon, without some urgent or reasonable cause.

Cover his head] In the 18 C. 2. An action of trespass for assault and battery, was brought against a churchwarden; who pleaded that the plaintiff had his hat on in time of divine service, and that he desired him to put it off, and upon refusal took it off, and delivered it into his hand. And all the court held, that the plea was good; except Twisden, who conceived that all that the churchwarden could do, was to present him to the spiritual court: tho' it is very apparent, how necessary an immediate remedy is, in case of this or the like disorders committed in the worship of god. The court also said, that the churchwardens may chastise boys playing in the churchyard, — and much more in the church. Gibb. 294. 2 Keb. 124. Sid. 301.

Can. 19. The churchwardens or questmen and their assistants, shall not suffer any idle persons to abide either in the churchyard or church porch, during the time of divine service; but shall cause them either to come in, or to depart.

Can. 85. The churchwardens or questmen shall take care, that in every meeting of the congregation peace be well kept; and that all persons excommunicated, and so denounced, be kept out of the church.

Can.

Can. 90. The churchwardens or questmen shall diligently see, that none do walk or stand idle or talking in the church, or in the churchyard, or the church porch, during the time of divine service.

Can. 111. In all visitations of bishops and archdeacons, the churchwardens or questmen and sidemen shall truly and personally present the names of all those, which behave themselves rudely and disorderly in the church; or which, by untimely ringing of bells, by walking, talking, or other noise, shall hinder the minister or preacher.

2. By the 1 Mar. sess. 2. c. 3. *If any person of his own power and authority shall willingly and of purpose, by open and overt word fact act or deed, maliciously or contemptuously molest let disturb vex or trouble, or by any other unlawful ways or means disquiet or misuse any preacher that shall be licensed allowed or authorized to preach by the queen's highness, or by any archbishop or bishop of this realm, or by any other lawful ordinary, or by any of the universities of Oxford and Cambridge, or otherwise lawfully authorized or charged by reason of his cure benefice or other spiritual promotion or charge, in any of his open sermon preaching or collation that he shall make declare preach or pronounce, in any church chapel churchyard or in any other place used frequented or appointed to be preached in: s. 2.* By the statute of the 1 Mar.

Or shall maliciously willingly or of purpose molest let disturb vex disquiet or otherwise trouble, any parson vicar parish priest or curate or any lawful priest, preparing saying doing singing ministring or celebrating the mass, or other such divine service, sacraments or sacramentals, as was most commonly frequented and used in the last year of the reign of king Henry the eighth, or that at any time hereafter shall be allowed set forth or authorized by the queen's majesty: s. 3.

Or shall contemptuously unlawfully or maliciously, of their own power or authority, pull down deface spoil abuse break or otherwise unreverently handle or order the most blessed comfortable and holy sacrament of the body and blood of our saviour Jesus Christ, commonly called the sacrament of the altar, that shall be in any church or chapel or in any other decent place, or the pix or canopy wherein the same sacrament shall be; or unlawfully contemptuously or maliciously, of his own power and authority, pull down deface spoil or otherwise break any altar crucifix or cross that shall be in any church chapel or churchyard: — That then every such offender in any the premisses, his aiders, procurers or abettors, immediately and forthwith after the offence committed, shall be apprehended by any constable or churchwarden of the parish town or place where the offence shall be committed, or by any other officer, or by any other person then being present at the time of the offence committed: s. 4.

Which person so apprehended shall with convenient speed be carried to a justice of the peace; who shall, upon due accusation by the apprehender or other person of such offence, commit him to safe keeping and custody as by his discretion shall be thought meet; and within six days next after the said accusation made, the said justice, with one other justice, shall diligently examine the offence: s. 5.

And if they shall find him guilty, by two witnesses or by confession, they shall immediately with convenient speed commit him to gaol for three months and further to the next quarter sessions to be holden next after the end of the said three months. At which quarter sessions, the person so committed to gaol, upon his

reconciliation and repentance in that behalf, before the said justices at the said sessions, shall be discharged out of prison, upon sufficient surety of his good abearing and behaviour, to be then and there taken by the said justices, for one whole year then next ensuing: And if he will not be reconciled and repent at the said quarter sessions, then he shall immediately in time convenient be further committed to the said gaol by the said justices or the more part of them, there to remain without bail until he shall be reconciled and be penitent for his said offence. s. 6.

And if any person, of his own authority and power, willingly and unlawfully do rescue any offender so apprehended, or will disturb hinder or let such offender to be apprehended; he shall suffer like imprisonment as aforesaid, and further shall forfeit 5*l*. s. 7.

And if any such offender be not apprehended immediately in time convenient as aforesaid, but do escape or go away; then the said escape shall be lawfully presented before the justices of the peace at the next quarter sessions: and the inhabitants of the parish where the escape was so suffered shall forfeit to the queen for every such escape 5*l*; to be levied as other like amerciaments, upon any village hundred or town, for the escape of a murderer or other felon, for not making hue and cry. s. 8.

And all justices of the peace, justices of assize, mayors bailiffs and justices of the peace within any city or town corporate, shall have power to inquire of hear and determine the said offences, and to set the said fines. s. 9.

Provided, that this shall not in any wise extend, to abrogate and take away the authority jurisdiction power and punishment of the ecclesiastical laws now standing and remaining in their force, or for the punishment of any the offences and misdemeanors aforesaid; but the same shall stand in force as if this act had not been made. s. 10.

Provided, that persons for any the said offences receiving punishment of the ordinary, having a testimonial thereof under his seal, shall not for the same estsoons be convicted before the justices; and in like wise receiving for the said offences punishment by the justices, shall not for the same estsoons receive punishment of the ordinary. s. 11.

Or other such divine service] It hath been resolved, that the disturbance of a minister in saying the present common prayer, is within this statute; for the express mention of such divine service, as should afterwards be authorized by queen Mary, doth implicitly include such also as should be authorized by her successors: for since the king never dies, a prerogative given generally to one, goeth of course to others. 1 *Haw.* 140.

Shall be apprehended] In the case of *Glover and Hind*, *M.* 25 *C.* 2. where an action of trespass of assault and battery was brought, for laying hands on the disturber; it was declared by the court, that at the common law a person disturbing divine service might be removed by any other person there present, as being all concerned in the service of god that was then performing; so that the disturber was a nuisance to them all, and might be removed by the same rule of law that allows a man to abate a nuisance. *Gibbs.* 304. 1 *Mod.* 168.

E. 15 C. 2. The court refused to grant a certiorari, to remove an indictment at the sessions against the defendant for not behaving himself reverently and modestly at the church during divine service; because altho' the offence is punishable by ecclesiastical censures, yet they judged it a proper cause within cognisance of the justices of the peace, and indictable. *1 Keb. 491.*

3. By the *1 W. c. 18.* If any person shall willingly and of purpose, maliciously or contemptuously, come into any cathedral or parish church chapel or other congregation permitted by this act, and disquiet or disturb the same, or misuse any preacher or teacher; he shall, on proof thereof before a justice of the peace, by two witnesses, find two sureties to be bound by recognizance in the sum of 50 l, and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions: and upon conviction of the said offence at such sessions, shall suffer the penalty of 20 l. *s. 18.* By the act of toleration.

4. By the *1 G. II. c. 5.* If any persons unlawfully riotously and tumultuously assembled together, to the disturbance of the publick peace, shall unlawfully and with force demolish or pull down, or begin to demolish or pull down, any church or chapel or any building for religious worship certified and registered according to the *1 W. c. 18.* the same shall be adjudged felony without benefit of clergy. And the hundred shall answer damages, as in cases of robbery. *s. 4, 6.* By the riot act.

IV. Performance of the divine service, in the several parts thereof.

The occasional offices are treated of under the title **Holidays.**

1. *Can. 14.* The common prayer shall be said or sung distinctly and reverently, upon such days as are appointed to be kept holy by the book of common prayer, and their eves, and at convenient and usual times of those days, and in such places of every church, as the bishop of the diocese or ecclesiastical ordinary of the place shall think meet for the largeness or straitness of the same, so as the people may be most edified. All ministers likewise shall observe the orders rites and ceremonies prescribed in the book of common prayer, as well in reading the holy scriptures and saying of prayers, as in administration of the sacraments, without either diminishing in regard of preaching, or in any other respect, or adding any thing in the matter or form thereof. Common prayer to be used on holidays.

2. And by the *preface to the book of common prayer*: All priests and deacons are to say daily the morning and evening prayer, either privately or openly, not being let by sickness, or some other urgent cause. On other days.

And the curate that ministreth in every parish church or chapel, being at home, and not being otherwise reasonably hindered, shall say the same in the parish church or chapel where he ministreth; and shall cause a bell to be tolled thereunto, a convenient time before he begin, that the people may come to hear god's word, and to pray with him.

3. By the rubrick before the common prayer of the *2 Ed. 6.* it was ordered thus: *The priest being in the quire, shall begin with a loud voice the lord's prayer, called the pater noster.* In what part of the church.

In the quire] That is, in his own seat there, as the way was all Edward the sixth's time; and as is still done in some churches: but in the beginning of queen Elizabeth's reign, reading desks began to be set up in the body of the church, and divine service to be read there, by appointment of the ordinaries, according to the power vested in them by the rubrick of the 5 & 6 Ed. 6. *Gibf.* 297.

Shall begin] All that now goes before, viz. the sentences, exhortation, confession, and absolution, were first inserted in the second book of Edward the sixth. 2 *Burnet* 76.

By the rubrick before the present common prayer: *The morning and evening prayer shall be used in the accustomed place of the church, chapel, or chancel; except it shall be otherwise determined by the ordinary of the place.*

Habit of the
minister officiating.

4. By *Can.* 58. Every minister saying the publick prayers, or ministering the sacraments or other rites of the church, shall wear a decent and comely surplice with sleeves, to be provided at the charge of the parish. And if any question arise touching the matter decency or comeliness thereof, the same shall be decided by the discretion of the ordinary. Furthermore, such ministers as are graduates shall wear upon their surplices at such times, such hoods as by the orders of the universities are agreeable to their degrees; which no minister shall wear, being no graduate, under pain of suspension: notwithstanding, it shall be lawful for such ministers as are not graduates, to wear upon their surplices, instead of hoods some decent tippet of black, so it be not silk.

But this canon (which is somewhat observable) is in part destroyed by the statute law, and by the rubrick before the present common prayer.

For by the 1 *El. c.* 2. it is provided, that *such ornaments of the church, and of the ministers thereof, shall be retained and used, as was in this church of England by authority of parliament in the second year of the reign of king Edward the sixth; until other order shall be therein taken by the authority of the queen's majesty, with the advice of her commissioners appointed and authorized under the great seal for causes ecclesiastical, or of the metropolitan of this realm.* f. 25. Which other order, as to this matter, was never taken.

And by the rubrick before the common prayer of the 13 & 14 *C.* 2. *It is to be noted, that such ornaments of the church, and of the ministers thereof at all times of their ministration, shall be retained and be in use, as were in this church of England by the authority of parliament in the second year of the reign of king Edward the sixth.*

Therefore it is necessary to recur in this matter, to the common prayer book established by act of parliament in the second year of king Edward the sixth. In which there is this rubrick: "In the saying or singing of
" *matens* and *evensonge*, *baptizyng* and *burying*, the minister in parishes
" churches and chapels annexed to the same, shall use a *surples*. And
" in all cathedrall churches and colledges, the archdeacons, deanes,
" *provestes*, *maisters*, *prebendaries*, and *fellows*, beinge graduates,
" may use in the quire, beside theyr *surples*, such hoodes as pertaineth

“taineth to their severall degrees whiche they have taken in any universitie within this realme. But in all other places, every minister shall be at libertie to use any surples or no. It is also seemly that graduates, when they dooe preache, shoulde use fuche hoodes as pertaineth to theyr severall degrees.”

So that in marrying, churching of women, and other offices not here specified, and even in the administration of the holy communion, it seemeth that a surplice is not necessary. And the reason why it is not enjoined for the holy communion in particular, is, because other vestments are appointed for that ministration, which are as followeth: “Upon the day, and at the time appointed for the ministration of the holy communion, the priest that shall execute the holie ministry, shall put upon hym the vesture appointed for that ministration, that is to say, a white *albe* plain, with a vestment or *cope*. And where there be many priestes or deacons, there so many shall be ready to helpe the priest in the ministration, as shall be requisite; and shall have upon them likewyse the vestures appointed for their ministry, that is to say, *albes* with *tunacles*.”

Note, the alb differs from the surplice in being close sleeved.

“And whensoever the bishop shall celebrate the holie communion in the church, or execute any other publique ministration; he shall have upon hym, besyde his rochette, a surples or albe, and a cope or vestment, and also hys pastoral staffe in hys hand, or elles borne or holden by hys chapeleyn.”

5. In the 2d of Ed. 6. The order for morning and evening prayer began (as was said before) with the lord's prayer, and ended with the third collect for grace; the other five prayers that now follow having been added since. *Gibf.* 300. Morning and evening prayer.

From which, and from other observations which follow, it will appear, that besides the severall offices being now generally put into one, which at first were distinct and separate, they are now become much longer than originally they were, by the additions from time to time which have thereunto been made.

6. *Rubr.* The psalter followeth the division of the hebrews, and the translation of the great english bible, set forth and used in the time of king Henry the eighth and Edward the sixth.

7. *Can.* 15. The litany shall be said or sung, when and as is set down in the book of common prayer, by the parsons vicars ministers or curates, in all cathedral collegiate and parish churches and chapels, in some convenient place, according to the discretion of the bishop of the diocese, or ecclesiastical ordinary of the place; more particular, upon the wednesday and fridays weekly, tho' they be not holidays, the minister at the accustomed hours of service shall resort to the church and chapel, and warning being given to the people by tolling of a bell, shall say the litany prescribed in the book of common prayer: whereunto we wish every householder, dwelling within half a mile of the church, to come or send one at the least of his household fit to join with the minister in prayers.

8. Of

Prayers and
thanksgivings
after the li-
tany.

8. Of the prayers and thanksgivings which now stand at the end of the litany service, the first two prayers (for rain and fair weather) were at the end of the communion service in the book of the 2 Ed. 6. To which were added in the 5 Ed. 6. these prayers, In the time of dearth and famine; In the time of war; and, In the time of plague and sickness. The prayer to be used after any other, and the thanksgivings for rain, fair weather, plenty, and deliverance from enemies, were brought in by king James the first. The prayers, In the ember weeks, For the parliament, and For all conditions of men, were added in 1661; as were also the general thanksgiving, and the thanksgiving for publick peace, and for deliverance from the plague. *Gibf.* 301.

Singing.

9. By the severall acts of uniformity, the form of worship directed in the book of common prayer shall be used in the church, and no other; but with this proviso, that it shall be lawful for all men, as well in churches chapels oratories or other places, to use openly any psalms or prayer taken out of the bible, at any due time, not letting or omitting thereby the service, or any part thereof, mentioned in the said book. 2 & 3 Ed. 6. c. 1. s. 7.

And whereas heretofore there hath been great diversity in saying and singing in churches within this realm, some following Salisbury use, some Hereford use, and some the use of Bangor, some of York, some of Lincoln; now from henceforth all the whole realm shall have but one use. Pref. to the com. pr.

Salisbury use] Lindwood speaking of the use of *Sarum*, says, that almost the whole province of Canterbury followeth this use; and adds as one reason of it, that the bishop of *Sarum* is precentor in the college of bishops, and at those times when the archbishop of Canterbury solemnly performeth divine service in the presence of the college of bishops, he ought to govern the quire, by usage and ancient custom. *Gibf.* 259.

Some Hereford use] In the northern parts was generally observed the use of the archiepiscopal church of York; in South Wales, the use of Hereford; in North Wales, the use of Bangor; and in other places, the use of other of the principal sees, as particularly that of Lincoln. *Ayl. Par.* 356.

The rule laid down for church musick in England almost 1000 years ago, was, that they should observe a plain and devout melody, according to the custom of the church. And the rule prescribed by queen Elizabeth in her injunctions was, that there should be a modest and distinct song, so used in all parts of the common prayers in the church, that the same may be as plainly understood, as if it were read without signing. Of the want of which grave serious and intelligible way, the reformatio legum had complained before. And whether some regulations may not now be necessary, to render church musick truly useful to the ends of devotion, and to guard against indecent levities, seemeth to require some consideration. *Gibf.* 298, 299.

10. By the statute of the 26 G. 2. c. 33. After the second lesson shall the banns of matrimony be published. Publication of ecclesiastical matters in the church.

And by the *rubrick*: After the Nicene creed is ended, the curate shall declare unto the people what holidays or fasting days are in the week following to be observed; and then also, if occasion be, shall notice be given of the communion; and briefs, citations, and excommunications read: and nothing shall be proclaimed or published in the church, during the time of divine service, but by the minister; nor by him any thing, but what is prescribed in the rules of this book, or enjoined by the king, or by the ordinary of the place.

11. The clergy in queen Elizabeth's time being very ignorant (and no wonder, their stipends in most places being exceeding small); and moreover the state having a jealous eye upon them, as if they were not very well affected to the reformation; none were permitted to preach without licence, but they were to study and read the homilies gravely and aptly; and they that were instituted, subscribed a promise to the same effect. And this continued in some measure in the next reign: for ministers not licensed to preach, were by the canons prohibited to expound any text of scripture, and were only to read the homilies, even in their own cures. But the occasion of those canons being now taken away, the bishops do generally and justly forbear to put the canons as to this matter in execution; and every priest is permitted to preach, at least in his own cure, as he may and ought to do by the old canon law, and by the charge given him at his ordination, and by the very nature of his office. *Johns.* 48. Preaching.

The restraints in this kind were (and are) as follows:

Arundel. No priest not being licensed shall exercise the office of preaching, until he shall be examined and sent by the bishop, and shall produce the authority by which he preacheth. *Lind.* 288.

Form of ordaining deacons: Take thou authority to read the gospel in the church of god, and to preach the same, if thou be thereto licensed by the bishop himself.

Form of ordaining priests: Take thou authority to preach the word of god, and to minister the holy sacraments, in the congregation where thou shalt be lawfully appointed thereunto.

Art. 23. It is not lawful for any man, to take upon him the office of publick preaching, or ministring the sacraments in the congregation, before he be lawfully called and sent to execute the same. And those we ought to judge lawfully called and sent, which be chosen and called to this work by men who have publick authority given unto them in the congregation, to call and send ministers into the lord's vineyard.

Can. 36. No person shall be received into the ministry, nor admitted to any ecclesiastical living, nor suffered to preach, to catechize, or to be a lecturer or reader of divinity in either university, or in any cathedral or collegiate church, city, or market town, parish church, chapel, or any other place within this realm; except he be licensed either by the archbishop or by the bishop of the diocese where he is to be placed, under their hands and seals, or by one of the two universities under their seal likewise

likewise; and except he shall first subscribe to the three articles concerning the king's supremacy, the book of common prayer, and the thirty nine articles: and if any bishop shall license any person without such subscription, he shall be suspended from giving licences to preach for the space of twelve months.

And by the 31 *El. c. 6.* If any person shall receive or take any money, fee, reward, or any other profit, directly or indirectly, or any promise thereof, either to himself or any of his friends (all ordinary and lawful fees only excepted), to procure any licence to preach; he shall forfeit 40l. *f. 10.*

After the preacher shall be licensed, then it is ordained as followeth:

Can. 45. Every beneficed man, allowed to be a preacher, and residing on his benefice, having no lawful impediment, shall in his own cure, or in some other church or chapel (where he may conveniently) near adjoining, where no preacher is, preach one sermon every Sunday of the year; wherein he shall soberly and sincerely divide the word of truth, to the glory of god, and to the best edification of the people.

Can. 47. Every beneficed man, licensed by the laws of this realm (upon urgent occasions of other service) not to reside upon his benefice, shall cause his cure to be supplied by a curate that is a sufficient and licensed preacher, if the worth of the benefice will bear it. But whosoever hath two benefices, shall maintain a preacher licensed, in the benefice where he doth not reside, except he preach himself at both of them usually.

By *Can. 50.* Neither the minister, churchwardens, nor any other officers of the church, shall suffer any man to preach within their churches or chapels, but such as by shewing their licence to preach shall appear unto them to be sufficiently authorized thereunto, as is aforesaid.

Can. 51. The deans, presidents, and residentiaries of any cathedral or collegiate church, shall suffer no stranger to preach unto the people in their churches; except they be allowed by the archbishop of the province, or by the bishop of the same diocese, or by either of the universities: and if any in his sermon shall publish any doctrine either strange or disagreeing from the word of god, or from any of the thirty nine articles, or from the book of common prayer; the dean or residents shall by their letters, subscribed with some of their hands that heard him, so soon as may be, give notice of the same to the bishop of the diocese, that he may determine the matter, and take such order therein as he shall think convenient.

Can. 52. That the bishop may understand (if occasion so require) what sermons are made in every church of his diocese, and who presume to preach without licence; the churchwardens and sidemen shall see, that the names of all preachers which come to their church from any other place, be noted in a book, which they shall have ready for that purpose; wherein every preacher shall subscribe his name, the day when he preached, and the name of the bishop of whom he had licence to preach.

Can. 53. If any preacher shall in the pulpit particularly or namely of purpose impugn or confute any doctrine delivered by any other preacher in

in the same church, or in any church near adjoining, before he hath acquainted the bishop of the diocese therewith, and received order from him what to do in that case, because upon such publick dissenting and contradicting there may grow much offence and disquietness unto the people; the churchwardens or party grieved shall forthwith signify the same to the said bishop, and not suffer the said preacher any more to occupy that place which he hath once abused, except he faithfully promise to forbear all such matter of contention in the church, until the bishop hath taken further order therein: who shall with all convenient speed so proceed therein, that publick satisfaction may be made in the congregation where the offence was given. Provided, that if either of the parties offending do appeal, he shall not be suffered to preach *pendente lite*.

Can. 55. Before all sermons, lectures, and homilies, the preachers and ministers shall move the people, to join with them in prayer, in this form, or to this effect, as briefly as conveniently they may. "Ye shall pray for Christ's holy catholick church, that is, for the whole congregation of christian people dispersed throughout the whole world, and especially for the churches of England, Scotland, and Ireland. And herein I require you most especially, to pray for the king's most excellent majesty, our sovereign lord James, king of England, Scotland, France, and Ireland, defender of the faith, and supreme governor in these his realms, and all other his dominions and countries, over all persons, in all causes, as well ecclesiastical as temporal. Ye shall also pray for our gracious queen Anne, the noble prince Henry, and the rest of the king and queen's royal issue. Ye shall also pray for the ministers of god's holy word and sacraments, as well archbishops and bishops, as other pastors and curates. Ye shall also pray for the king's most honourable council, and for all the nobility and magistrates of this realm, that all and every of these in their several callings, may serve truly and painfully to the glory of god, and the edifying and well governing of his people, remembering the account that they must make. Also ye shall pray for the whole commons of this realm, that they may live in the true faith and fear of god, in humble obedience to the king, and brotherly charity one to another. Finally, let us praise god for all those which are departed out of this life in the faith of Christ, and pray unto god that we may have grace to direct our lives after their good example; that this life ended, we may be made partakers with them of the glorious resurrection in the life everlasting: always concluding with the lord's prayer."

The like form was enjoined by the injunctions of queen Elizabeth in the year 1559; and a form of bidding was likewise prescribed (but of a different tenor from these two) by the injunctions of Edward the sixth; and also before this (and before the reformation) we find the like bidding form in english, in a *festival* printed in the year 1509, which is much longer than these, and is reprinted at length by Dr Burnet in his history of the reformation. Vol. 2. Append. p. 104.

The occasion of this kind of bidding prayer (as it is called) was, that in the ancient church silence was commanded to be kept for a time, for

the peoples secret prayers; and in this or such like form the minister directed the people what to pray for. A remainder of which usage is still preserved in the office of ordination of priests. *1 Warn. 28.*

In the year 1661, there is an entry in the journal of the upper house of convocation, that the bishops unanimously voted for one form of prayer, to be used by all ministers, as well before as after sermon: and that this order was pursued in the convocation (altho' not brought to effect), appears from the minutes of the lower house, where on Jan. 31. we find a committee appointed for this (amongst other purposes) to compile a prayer before sermon. *Gibbs. 311.*

Peccham. Every priest shall explain to the people, four times a year, the fourteen articles of faith, the ten commandments, the two evangelical precepts, the seven works of mercy, the seven deadly sins with their consequences, the seven principal virtues, and the seven sacraments of grace. The fourteen articles of faith (whereof seven belong to the mystery of the trinity, and seven to Christ's humanity) are, 1. The unity of the divine essence in the three persons of the undivided trinity. 2. That the father is god. 3. That the son is god. 4. That the holy ghost, proceeding from the father and the son, is god. 5. The creation of heaven and earth by the whole and undivided trinity. 6. The sanctification of the church by the holy ghost; the sacraments of grace; and all other things wherein the christian church communicateth. 7. The consummation of the church in eternal glory, to be truly raised again in flesh and spirit; and opposite thereunto, the eternal damnation of the reprobate. 8. The incarnation of Christ. 9. His being born of the blessed virgin. 10. His suffering and death upon the cross. 11. His descent into hell. 12. His resurrection from the dead. 13. His ascension into heaven. 14. His future coming to judge the world. The ten commandments are the precepts of the old testament. To these the gospel addeth two others, to wit, the love of god, and of our neighbour. Of the seven works of mercy, six are collected out of the gospel of St Matthew; to feed the hungry, to give drink to the thirsty, to entertain the stranger, to cloath the naked, to visit the sick, and to comfort those that are in prison: and the seventh is gathered out of Tobias, to wit, to bury the dead. The seven deadly sins are pride, envy, anger or hatred, slothfulness, covetousness, gluttony and drunkenness, luxury. The seven principal virtues are faith, hope, charity, which respect god; prudence, temperance, justice, fortitude, with regard unto men. The seven sacraments of grace are baptism, confirmation, orders, penance, matrimony, the eucharist, and extreme unction. *Lind. 1, 43, 54.*

Homilies.

12. *Rubrick after the nicene creed.* Then shall follow the sermon, or one of the homilies already set forth or hereafter to be set forth by authority.

Form of ordaining deacons. It appertaineth to the office of a deacon, to read holy scriptures and homilies in the church.

Art. 35. The second book of homilies, the severall titles whereof we have joined unto this article, doth contain a godly and wholesome doctrine, and necessary for these times, as doth the former book of homilies, which were

were set forth in the time of Edward the sixth; and therefore we judge them to be read in churches, by the ministers diligently and distinctly, that they may be understood of the people.

Can. 49. No person whatsoever, not examined and approved by the bishop of the diocese, or not licensed as is aforesaid for a sufficient or convenient preacher, shall take upon him to expound in his own cure or elsewhere, any scripture or matter of doctrine; but shall study to read plainly and aptly (without glossing or adding) the homilies already set forth, or hereafter to be published by lawful authority, for the confirmation of the true faith, and for the good instruction and edification of the people.

Can. 46. Every beneficed man, not allowed to be a preacher, shall procure sermons to be preached in his cure, once in every month at the least, by preachers lawfully licensed; if his living, in the judgment of the ordinary, will be able to bear it. And upon every Sunday, when there shall not be a sermon preached in his cure; he or his curate shall read some one of the homilies prescribed or to be prescribed by authority, to the intents aforesaid.

13. Besides the publication of things merely ecclesiastical, there are divers acts of parliament, and other matters temporal, required to be published in the churches. Such are these which follow:

The act of uniformity of the 5 & 6 *Ed. 6.* is required to be read in the church by the minister once every year.

The act against swearing, of the 19 *G. 2.* to be read in the church by the minister four times every year.

The act of the 12 *An. st. 2. c. 18.* concerning ships in distress, to be read in the church four times a year, in all the sea port towns, and on the coast, immediately after prayers and before the sermon.

The act for the observation of the fifth of November, to be read by the minister on that day, after the morning prayer or preaching.

The act for the commemoration of king Charles the second's restoration, to be read after the nicene creed on the lord's day next before the twenty ninth day of May yearly.

By the 3 & 4 *W. c. 12.* What defaults or annoyances the surveyor of the highways shall find in the highways, causeways, bridges, ditches, hedges, trees, watercourses, drains, or gutters; he shall, immediately after sermon ended, give publick notice of the same in the parish church. *f. 8.*

By the 17 *G. 2. c. 3.* The churchwardens and overseers of the poor shall cause publick notice to be given in the church, of every rate for relief of the poor allowed by the justices of the peace, the next Sunday after such allowance; and no rate shall be reputed sufficient to be collected, till after such notice given. *f. 1.*

By the yearly land tax acts, and by the acts for laying duties upon houses and windows, the collectors of the said tax and duties respectively shall, within ten days after their receipt of the duplicates of the assessment, cause publick notice to be given in the church or chapel immediately after divine service on the lord's day (if any such divine service shall

Publication of
acts of parlia-
ment, and
other temporal
matters in the
church.

be performed therein within that time) of the time and place appointed by the commissioners, for hearing and determining appeals against the said assessment.

Pulpit. See Church.

Purgation.

Purgation in general.

1. **B**Y a provincial constitution of archbishop *Langton*; Ecclesiastical judges shall not compel any to come to purgation at the suggestion of their apparitors, unless they be infamed by grave and good men. *Lind.* 312.

And by a constitution of archbishop *Stratford*; Persons defamed of crimes and excesses, and willing to purge themselves, shall not be drawn out of one deanery into another, or to places in the country where victuals and necessities of life are not to be sold: And in the enjoining of purgation to them, not more than six compurgators shall be required for fornication, or the like crime; nor more than twelve for a greater crime, as for adultery. *Lind.* 343.

And purgation was exercised in the following manner: When any man or woman lay under a common suspicion or publick fame of incontinence, or other vice; tho' there was not proof plain and full enough to convict them, yet were they liable to be summoned before the spiritual judge, and to be charged with the crime. If they confessed; they had a certain penance immediately enjoined them: If they denied; the judge enjoined them purgation to be performed on a day appointed, by their own oath, and by the oaths of five or six neighbours (more or less, according to the nature of the crime, and the condition of the person); and those to be of good fame and sober conversation. The oath of the person suspected was, to declare his own innocence; and the oath of the compurgators, that they believed what he swore was true. If the person came at the day appointed, together with his neighbours, and purged himself according to the rules of the church, he was dismissed, and declared innocent, and restored to his good name; but he was at the same time enjoined to avoid the cause of suspicion, or the ground of the fame, for the time to come. But if he appeared not, he was declared contumacious, and proceeded against as such; or if he did appear, and could not perform purgation (that is, either would not swear to his own innocence, or could not bring others to swear that they believed he swore true,) such failure was taken for conviction, and the judge proceeded to enjoin penance, in the same manner as if the person had been duly convicted, by his own confession, or by the testimony of others. *Gibf.* 1042.

But by the 13 C. 2. c. 12. s. 4. *It shall not be lawful for any person exercising ecclesiastical jurisdiction, to tender or administer unto any person whatsoever, the oath usually called the oath ex officio, or any other oath, where-*
by

by such person to whom the same is tendred or administred, may be charged or compelled to confess, or accuse, or to purge him or herself, of any criminal matter or thing, whereby he or she may be liable to censure or punishment.

Compelled to confess] So that any person may still offer himself voluntarily, for the clearing of his innocence, to such purgation as hath been described. *Gibf. 1042.*

2. Anciently, upon the allowance of the benefit of clergy, the person accused was delivered to the ordinary, to make his purgation; which was to be before a jury of twelve clerks, by his own oath affirming his innocence, and the oaths of twelve compurgators as to their belief of it. *Purgation on the benefit of clergy allowed.*
2 H. H. 383. *Wood's Civ. L. 669.*

But now, by the statute of the 18 El. c. 7. this kind of purgation is also taken away; and the person admitted to his clergy shall not be delivered to the ordinary,

Quakers. See Dissenters.

Quare impedit.

QUARE impedit is a writ that lieth, where one hath an advowson, and the parson dies, and another presents a clerk, or disturbs the rightful patron to present; then the rightful patron (altho he be a purchaser, and do not claim from his ancestors) shall have this writ. But an assize of *darrein presentment* lies, where a man or his ancestors have presented before. From whence it follows, that where a man may have an assize of *darrein presentment*, he may have a *quare impedit*; but not contrariwise. *Terms of the Law.*

And it is so called, in like manner as most of the other writs in the register, from certain words in the writ respecting the special matter for which the writ is brought.

The law concerning writs of *quare impedit* is treated of under the title *Advowson.*

Quare incumbravit.

QUARE incumbravit is a writ that lies, where two are in plea for the advowson of a church, and the bishop admits the clerk of one of them within the six months; then the other shall have this writ against the bishop. And this writ lies always depending the plea. *Terms of the L.*

Which is treated of more at large under the title *Advowson.*

Quare

Quare non admisit.

QUARE non admisit is a writ that lies, where a man hath recovered an advowson, and sends his clerk to the bishop to be admitted, and the bishop will not receive him; then he shall have the said writ against the bishop. *Terms of the L.*

Quarrelling in the church or churchyard. See Church.

Querela duplex. See Double quarrel.

Questmen. See Churchwardens.

Quod permittat.

QUOD permittat is a writ granted to the successor of a parson, for the recovery of common of pasture, by the statute of the 13 Ed. 1. c. 24. and hath its name from those words in the writ.

Rape.

Carnally
knowing a
woman child
under ten.

1. **I**F any person shall unlawfully and carnally know and abuse any woman child under the age of ten years; every such unlawful and carnal knowledge shall be felony, and the offender shall suffer as a felon without allowance of clergy. 18 El. c. 7. f. 4.

Taking a wo-
man by force.

2. By the 3 Ed. 1. c. 13. The king prohibiteth, that none do take away by force any maiden within age (neither by her own consent nor without), nor any wife or maiden of full age, nor any other woman against her will; and if any do, at his suit that will sue in forty days, the king shall do common right; and if none commence his suit within forty days, the king shall sue: and such as be found culpable, shall have two years imprisonment, and after shall fine at the king's pleasure; and if they have not whereof, they shall be punished by longer imprisonment, according as the trespass requireth.

Do take away by force] The taking away by force of any woman whatsoever against her will, albeit there be no rape, is generally prohibited by this act, upon the penalty herein expressed. 2 Inst. 182.

Any maiden within age] This shall be taken for her age of consent, that is, twelve years old, for that is her age of consent to marriage; and the taking her away within that age, whether she consent or no, is prohibited by this act. 2 *Inst.* 182.

By the 13 Ed. 1. ft. 1. c. 34. *Of women carried away with the goods of their husbands; the king shall have the suit for the goods so taken away.*

Of women carried away] This is to be understood of a violent taking away by any person; and so this action may be brought against women as well as men. 2 *Inst.* 435.

The king shall have the suit] Yet may the husband also have his action of trespass, both by the common law, and by the statute of the 3 Ed. 1. c. 13. 2 *Inst.* 434.

3. By the 3 H. 7. c. 2. *Where women, as well maidens, as widows, and wives, having substances, some in goods moveable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances be oftentimes taken by misdoers, contrary to their will, and after married to such misdoers, or to other by their assent, or defiled; it is enacted, that what person that taketh any woman so against her will unlawfully, that is to say, maid, widow, or wife, that such taking, procuring, and abetting to the same, and also receiving wittingly the same woman so taken against her will, and knowing the same, be felony; and that such misdoers, takers, and procurators to the same, and receitors, knowing the said offence in form aforesaid, be reputed and adjudged as principal felons.* Taking a woman having substance.

Where women &c.] This act, on the offender's part, doth extend to all degrees, and to all persons; but extendeth not to all women. For on the woman's part, three things are necessarily required to make the offence felony; 1. That the maid wife or widow have lands or tenements or moveable goods, or be an heir apparent. 2. That she be taken away against her will. 3. That she be married to the misdoer, or to some other by his consent, or be defiled (that is, carnally known). For if these concur not, the misdoer is no felon within this statute, but otherwise to be punished. 3 *Inst.* 61.

Contrary to their will] It is no manner of excuse, that the woman at first was taken away with her own consent; because if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly be said to be taken against her will, as if she had never given any consent at all: for till the force was put upon her, she was in her own power. 1 *Haw.* 110.

And it is not material, whether a woman so taken away be at last married or defiled, with her own consent or not, if she were under the force at the time; because the offender is in both cases equally within the words of the statute, and shall not be construed to be out of the meaning of it, for having prevailed over the weakness of a woman, whom by so base means he got into his power. 1 *Haw.* 110.

Receiving

Receiving wittingly the same woman] But by a construction of the common law, they that receive the misdoers, and not the woman, are only accessaries, and not principal felons. 3 *Inst.* 61, 62.

Be felony] And by the 39 *El. c. 9.* The benefit of clergy is taken away from the principals, procurers, and accessaries before.

And for the proof of this felony. the woman may be admitted an evidence against the misdoer, tho' married to him; because such marriage was founded in force and terror; and because, as such cases are generally contrived, so heinous a crime would go unpunished, unless the testimony of the woman should be received. *Gibf.* 418.

And when a woman is taken by force in one county, and married in another county, the offender may be indicted and found guilty in such other county; because the continuing of the force there, amounts to a forcible taking within the statute. 1 *Haw.* 110.

Taking a woman under sixteen.

4. By the 4 & 5 *P. & M. c. 8.* *It shall not be lawful to any person to take or convey away, or cause to be taken or conveyed away, any maid or woman child unmarried, being within the age of sixteen years, out of the possession custody or governance and against the will of her father or of such person to whom by his will or other act he appointed her guardian; except such taking and conveying away as shall be made without fraud, by or for her master or mistress, or her guardian in socage, or guardian in chivalry.* s. 2.

And if any person above the age of fourteen years, shall unlawfully take or convey, or cause to be taken or conveyed any maid or woman child unmarried being within the age of sixteen years, out of the possession and against the will of her father or mother or guardian; he shall, on conviction and attainder by the order and due course of the laws of this realm, be imprisoned for two years, or else pay such fine as shall be assessed by the court of star chamber. s. 3.

And if any person shall so take away or cause to be taken away, and deflower, any such maid or woman child; or shall against the will of or unknown to her father if he be living, or against the will of or unknown to her mother (having the custody of her) if he be dead; by secret letters, messages, or otherwise, contract matrimony with her: he shall, being thereof lawfully convicted as aforesaid, be imprisoned for five years, or else pay such fine as shall be assessed by the said court. The one moiety of which fines shall be, half to the king, and half to the party grieved. s. 4.

And the king and queen's honourable council of the star chamber, by bill of complaint or information, and justices of assize by inquisition or indictment, shall have power to hear and determine the said offences; upon every such indictment and inquisitions such process shall be awarded, as upon an indictment of trespass at common law. s. 5.

And if any woman child or maiden, being above the age of twelve years, and under the age of sixteen, do consent or agree to such person that shall so make any contract of matrimony; her next of kin, to whom the inheritance should come after her decease, shall have all such lands as she had in possession reversion or remainder at the time of such assent, during the life of such person that shall so contract matrimony; and after her decease the same shall come to such

such person as they should have done in case this act had not been made, other than to him only that so shall contract matrimony. f. 6.

Provided, that this shall not extend to any orphans in London, or any other city borough or town, where orphans are commonly provided for by grant or custom; but the lord mayor and aldermen of London, and the head officers in other cities boroughs or towns, may take such order therein as they have been wont. f. 7.

It shall not be lawful] This clause is but a declaration of the common law; by which any person might be fined and imprisoned for the offence therein specified and contained: and the statute is only an aggravation of punishment, and doth not create an offence. *Gibf.* 419.

Against the will of her father] *H.* 15 *G.* 2. *K.* against *Cornforth* and others. The court granted an information against the defendants, for taking away a *natural* daughter under sixteen, under the care of her putative father; being of opinion it was within this statute. *Str.* 1162.

Against the will of her father or mother or guardian] In the case of *Twissleton* and *King*, *M.* 20 *C.* 2. it was alledged, that the girl consented to go; but the court took no notice of that: and it being plainly against the will of the parents, the jury were directed to find the parties guilty. 2 *Keb.* 432.

By secret letters, messages, or otherwise] The mother of one *Tibboth*, fearing that her only daughter might be stolen, entreated the lady *Gore* to take her into her family; who married her (being under the age of sixteen) to her son, without consent of the mother, who was also her guardian. But the estate being sued for by *Hicks* according to the tenor of the statute, and it appearing to the court that the marriage was solemnized by a lawful minister, in the church, at a canonical hour, before several people, and while the church doors were open; the case was found not to be within the design and intention of this statute; nor could the plaintiff prove any thing to make a forfeiture: so he was nonsuit. *Gibf.* 420.

Honourable council of the star chamber] It is declared in *Moor's* case, that inasmuch as there are no negative words in this new conveyance of power to the star chamber, and the court of king's bench had a right to hear and determine before the statute; the same power which they had by the common law still remaineth to them, notwithstanding the statute; and that so it would have been, tho' the court of star chamber had still continued. And it appears that one *Story* was fined 100*l* by the court of king's bench, for taking away a young woman under sixteen out of her mother's custody; and two women who were assistants 50*l* each; and all bound to the good behaviour, the first for five years, and the two others for one year. *Gibf.* 420.

5. By the 13 *Ed.* 1. *st.* 1. *c.* 34. *If a man do ravish a woman married, Ravishment. maid, or other, where she did not consent, neither before nor after; he shall have judgment of life and of member: And where a man ravisheth a woman married,*

Rape.

married, lady, damosel, or other, with force, altho' she consent after ; he shall have such judgment as before is said, if he be attainted at the king's suit, and there the king shall have the suit.

He shall have judgment of life and of member] That is, he shall be attainted of felony. And this is to be understood, upon an appeal to be brought by the party ravished. But if she did consent, either before or after, she shall have no appeal. 2 *Inst.* 433, 434.

If he be attainted at the king's suit] And not at the suit of the party upon an appeal, as in the former case: for here it is supposed, that she consenteth afterwards; which barreth her appeal. 2 *Inst.* 434.

By the 6 R. 2. c. 6. *Against the offenders and ravishers of ladies, and the daughters of noblemen, and other women, it is ordained, that wheresoever they be ravished, and after such rape do consent to such ravishers, that as well the ravishers, as they that be ravished, be from thenceforth disabled to have or challenge all inheritance dower or joint seoffment, after the death of their husbands and ancestors. And the next of blood shall have title immediately after such rape to enter. And the husbands of such women, if they have husbands, or if they have not then their fathers or other next of blood shall have their suit against the ravishers, to have them thereof convict of life and member, altho' the same woman after such rape do consent to the ravisher: And the defendant shall not wage battel, but be tried by inquisition of the country. Saving to the king and other lords the escheats of such ravishers, if they be thereof convict.*

Shall have their suit] That is, by appeal.

By the 18 El. c. 7. *For the repressing of the most wicked and felonious rapes or ravishments of women, maids, wives, and damosels; it is enacted, that if any person shall commit any manner of felonious rape or ravishment, he shall be guilty of felony without benefit of clergy.*

And all rapes are commonly excepted out of the acts of general pardon.

Rate for the repair of the church: See **Church.**

Reader.

THE office of reader is one of the five inferior orders in the Romish church.

And in this kingdom, in churches or chapels where there is only a very small endowment, and no clergyman will take upon him the charge or cure thereof, it hath been usual to admit readers, to the end that divine service in such places might not altogether be neglected.

It is said, that readers were first appointed in the church about the third century. In the Greek church they were said to have been ordained by the imposition of hands: But whether this was the practice of all the Greek churches hath been much questioned. In the Latin church it was certainly otherwise. The council of Carthage speaks of no other ceremony, but the bishop's putting the bible into his hands in the presence of the people, with these words, "Take this book and be thou a reader of the word of god, which office if thou shalt faithfully and profitably perform, thou shalt have part with those that minister in the word of god." And in Cyprian's time, they seem not to have had so much of the ceremony as delivering the bible to them, but were made readers by the bishop's commission and deputation only, to such a station in the church. *Bingb. Antiq. V. 2. p. 31.*

Upon the reformation here, they were required to subscribe to the following injunctions:

"Imprimis, I shall not preach or interpret, but only read that which is appointed by publick authority:

I shall not minister the sacraments or other publick rites of the church, but bury the dead, and purify women after their childbirth:

I shall keep the register book according to the injunctions:

I shall use sobriety in apparel, and especially in the church at common prayer:

I shall move men to quiet and concord, and not give them cause of offence:

I shall bring in to my ordinary, testimony of my behaviour, from the honest of the parish where I dwell, within one half year next following:

I shall give place upon convenient warning so thought by the ordinary, if any learned minister shall be placed there at the suit of the patron of the parish:

I shall claim no more of the fruits sequestred of such cure where I shall serve, but as it shall be thought meet to the wisdom of the ordinary:

I shall daily at the least read one chapter of the old testament, and one other of the new, with good advisement, to the increase of my knowledge:

I shall not appoint in my room, by reason of my absence or sickness, any other man; but shall leave it to the suit of the parish to the ordinary, for assigning some other able man:

I shall not read but in poorer parishes destitute of incumbents, except in the time of sickness, or for other good considerations to be allowed by the ordinary:

I shall not openly intermeddle with any artificers occupations, as covetously to seek a gain thereby; having in ecclesiastical living the sum of twenty nobles or above by the year."

This was resolved to be put to all readers and deacons by the respective bishops, and is signed by both the archbishops, together with the bishops of London, Winchester, Ely, Sarum, Carlisle, Chester, Exeter, Bath and Wells, and Gloucester. *Strype's Annals. V. 1. p. 306.*

Reader.

By the foundation of divers hospitals, there are to be readers of prayers there, who are usually licensed by the bishop.

Reading desk. See Church.

Refusal. See Benefice.

Register.

SO far as this officer is to be considered solely in the capacity of a notary publick, see the title **Notary Publick**.

1. *Can.* 123. No chancellor, commissary, archdeacon, official, or any other person using ecclesiastical jurisdiction, shall speed any judicial act, either of contentious or voluntary jurisdiction, except he have the ordinary register of that court, or his lawful deputy; or if he or they will not or cannot be present, then such persons as by law are allowed in that behalf to write or speed the same, under pain of suspension ipso facto.

And this is according to the rule of the ancient canon law; which, to prevent falsifications, requireth the acts to be written by some publick person (if he may be had), or else by two other credible persons: and the credit which the canon law gives to a notary publick is, that his testimony shall be equal to that of two witnesses. *Gibf.* 996.

2. *Can.* 134. If any register, or his deputy or substitute whatsoever, shall receive any certificate without the knowledge and consent of the judge of the court; or willingly omit to cause any person (cited to appear upon any court day) to be called; or unduly put off and defer the examination of witnesses to be examined by a day set and assigned by the judge; or do not obey and observe the judicial and lawful monition of the said judge; or omit to write or cause to be written such citations and decrees as are to be put in execution and set forth before the next court day; or shall not cause all testaments exhibited into his office to be registred within a convenient time; or shall set down or enact, as decreed by the judge, any thing false or conceited by himself, not so ordered or decreed by the judge; or in the transmission of processes to the judge ad quem, shall add or insert any falshood or untruth, or omit any thing therein, either by cunning or by gross negligence; or in causes of instance, or promoted of office, shall receive any reward in favour of either party, or be of counsel directly or indirectly with either of the parties in suit; or in the execution of their office shall do ought else maliciously, or fraudulently, whereby the said ecclesiastical judge or his proceedings may be slandered or defamed: we will and ordain, that the said register, or his deputy or substitute, offending in all or any of the premisses, shall by the bishop of the diocese be suspended from the exercise of his office, for the space of one two or three months or more, according to the quality of his offence; and

and that the said bishop shall assign some other publick notary to execute and discharge all things pertaining to his office, during the time of his said suspension.

3. Dr Godolphin says, If there be a question between two persons touching several grants, which of them shall be register of the bishop's court; this shall not be tried in the bishop's court, but at the common law: for altho' the subjectum circa quod be spiritual, yet the office it self is temporal. *God. 125.*

So in the case of *K. and Ward, H. 4 G. 2.* There was a mandamus to Dr Ward the commissary, to admit Henry Dryden to be deputy register of the archbishop of York's court; suggesting that Dr Thomas Sharpe had been admitted to the office, to execute the same by himself or his deputy; that he had appointed Dryden (who is averred to be a fit person) to be his deputy, whom the commissary had refused to admit, to the great damage of Dr Sharpe who complains; and therefore the writ commands the commissary to admit and swear Dryden, or shew cause to the contrary. To this the commissary returns; that long before the constituting Dryden to be deputy, John Sharpe and Thomas Sharpe were admitted to the office as principals, to hold for their lives, and the life of the survivor; that they, in the year 1714, appointed John Shaw to be their deputy, who executed the office till John Sharpe died; that Thomas Sharpe survived, and on May 12, 1727, by a new appointment constituted Shaw his deputy, who was admitted, and executed the office until suspended in the manner after mentioned; that Shaw at the times of his admission took an oath, that he would justly and honestly execute the office without favour or reward, and do every thing incumbent on the office, and not be an exacter or greedy of rewards; and then sets forth the 134th Canon; and further, that whilst Shaw was deputy, several proctors of the court on the sixteenth of February 1727 exhibited to the commissary several articles against him, complaining of divers misbehaviours in his office, contrary to several of the particulars set forth in the said canon; that Shaw being summoned on the sixth of April 1728, gave in his answer in writing (which is set forth); and then the return goes on, that forasmuch as it appeared to the commissary that the answer was insufficient, and that Shaw had confessed himself guilty of several omissions and extortions in the exercise of his office, therefore upon complaint thereof to the archbishop, he on the twenty first of May 1728, by his commission under his archiepiscopal seal directed to the commissary, and reciting that Shaw had been guilty in the manner before mentioned, doth therefore empower the commissary to suspend him and assume another notary publick; that by virtue hereof, he on the twenty fourth of May 1728 suspended Shaw for five years, and assumed Joseph Leech a notary publick, who before the constituting Dryden to be deputy, took upon him and hath ever since executed the office; that Shaw appealed, and in that appeal alledged, that on the twenty third of May 1728 he resigned the office, and that Dr Sharpe had appointed William Smith to be deputy; that delegates were appointed, who on the twenty third of October 1728 issued an inhibition to the commissary, that pending the appeal he should

do

do nothing to the prejudice of the appellant; that the appeal remains undetermined; and for these reasons he cannot admit Dryden to be the deputy of Dr Sharpe. Strange argued, that the return was ill, and that there ought to be a peremptory mandamus; which argument was to the following effect: "I must observe in general, that there is no incapacity returned in Dryden, no want of any regular appointment or deputation; on the contrary it appears, that Dr Sharpe had a power to make a deputy, and that he hath executed it with regard to Dryden: As therefore Dryden hath *prima facie* a regular title to the office, the commissary who is to admit him ought not to refuse to do his duty; especially considering, that the admission gives no right, but only a legal possession, to enable him to assert his right if he has any: And upon this foundation it is, that non fuit electus hath been held no good return to a mandamus to swear in a churchwarden, because it is directed only to a ministerial officer, who is to do his duty, and no inconvenience can follow; for if the party hath a right, he ought to be admitted; if he hath not, the admission will do him no good: This effect of a mandamus to admit, was laid down in the case of the king against the dean and chapter of Dublin, H. 7 G. which was a mandamus to admit one Dougate to his seat in the choir and his voice in the chapter; for wherever the office is but ministerial, he is to execute his part, let the consequence be what it will: In the case of the king and Simpson, M. 11 G. there was a mandamus to the archdeacon of Colchester, to swear Rodney Fane into the office of churchwarden; the archdeacon returned, that before the coming of the writ he received an inhibition from the bishop; but the court held that was no excuse, and that a ministerial officer is to do his duty, whether the act will be of any validity or not: In the case of Taylor and Raymond, M. 4 G. to a mandamus to swear in a churchwarden, it was returned, that before the coming of the writ he had sworn in another; and it was held an ill return, for be the right which way it will, the officer is to do his duty: These two last cases are both in point; in one there was an inhibition (as there is in this case), and in the other there was another officer, as they pretend there is here, to wit, Joseph Leech: But what is that inhibition? it is, to do nothing that may prejudice the appeal: Can this hurt Shaw? no; if he is relieved on the appeal, he will be restored, tho' another is admitted; if he is not relieved, it must be for want of a right, and he will not be capable of suffering any prejudice by the other's admission: But, what takes off all pretence of the inhibition's being material in this case is, that it appears by Shaw's own shewing, that he had the day before his suspension surrendered his deputation; and that accounts for the last part of the return, that the appeal is undetermined, it not being of any consequence to Shaw to prosecute it any further; besides, this would be to deprive Dr Sharpe of the benefit of this office as long as Shaw shall think fit to sleep upon the appeal, Dr Sharpe having no power to expedite the determination: A deputy is but at will; and this is to deprive Dr Sharp of his will for five years; which suspension I take to be illegal; for the expression in the canon of such a number of months *or more*, must have a reasonable construction, and can never be extended to five years:

Shaw

Shaw is intirely divested of the office, which answers the purpose of reformation better than a bare suspension : As therefore the office is vacant, there can be no reason why the commissary should refuse to fill it up ; and a peremptory mandamus ought to go." And by the court : Surely it is attempting too much, to support this as a good return ; the effect of a mandamus, as laid down, is certainly so, that it gives no right : The canon only intended, that the bishop should suspend, where the principal would not revoke ; but an actual revocation is better than a suspension : It would be carrying the power of inhibitions a great way, if we should allow them the force contended for by the return : We are therefore all of opinion, that the return is ill. Then exception was taken to the writ, that a mandamus would not lie for a deputy ; and for this was cited 6 *Mod.* 18. where Holt chief justice lays it down, that for a deputy a mandamus will not lie : But it was answered, that this is not a mandamus for the deputy, but for the principal to be admitted to have a deputy ; the refusal of Dryden is laid to be, to the great damage of Dr Sharpe, and therefore to do Dr Sharpe right in the premisses is the writ awarded ; it appears Dr Sharp has a freehold in the office, so tho' his deputy is but at will, he hath it for life ; and in 1 *Ventr.* 110. a mandamus was granted to restore a person to the office of deputy steward of the court of the council of the Marches, and it was held to lie for a revocable deputy, because the principal hath no other way to get him admitted ; and in the report of the same case in 1 *Lev.* 306. it is said by the court, that altho' a mandamus doth not lie for a deputy, yet it lies for him who deposes him, to have him admitted or restored, for otherwise he may be deprived of his power to make a deputy. Then it was further objected, that a mandamus doth not lie for a spiritual office ; and for this were cited divers cases, where it was determined that a mandamus will not lie for a proctor, who belongeth as much to the ecclesiastical court as the register doth : Unto which it was answered, that this is not any objection ; a mandamus hath been granted to admit an under-schoolmaster, and yet schoolmasters are within the canons of 1603 as well as registers ; so in the case of Mr Folks lately, for the office of apparitor general of the archbishop of Canterbury ; so it hath been often granted for a parish clerk ; for a sexton ; so in like manner it was granted to restore Dr Bentley to his degrees ; and to admit Dr Sherlock to a prebend at Norwich ; and it is to be observed, that no assize will lie for this office, therefore if the party hath not this remedy, he hath none ; the reason why it was refused to a proctor was, because it did not appear what interest he had, but here appears a freehold. And by the court ; We all think this writ is good, notwithstanding the exceptions that have been taken, and therefore a peremptory mandamus must go. *Sir.* 893.

Register book.

Register of
christenings,
marriages,
and burials.

1. **T**HE keeping of a church book, for the age of those that should be born and christened in the parish, began in the thirtieth year of king Henry the eighth. *God. 144, 145. 3 Burnet 139.*

And the following canon, in the main of it, was only a reinforcement of one of the lord Cromwell's injunctions in the year 1538; which was continued in those of king Edward the sixth, and of queen Elizabeth; in whose reign, a protestation being appointed to be made by ministers at institution, one head of it was, — I shall keep the register book, according to the queen's majesty's injunctions. *Gibbs. 204.*

By Can. 70. *In every parish church and chapel within this realm, shall be provided one parchment book at the charge of the parish, wherein shall be written the day and year of every christening, wedding, and burial, which have been in the parish since the time that the law was first made in that behalf, so far as the ancient books thereof can be procured, but especially since the beginning of the reign of the late queen. And for the safe keeping of the said book, the churchwardens, at the charge of the parish, shall provide one sure coffer, with three locks and keys; whereof one to remain with the minister, and the other two with the churchwardens severally; so that neither the minister without the two churchwardens, nor the churchwardens without the minister, shall at any time take that book out of the said coffer. And henceforth upon every sabbath day, immediately after morning or evening prayer, the minister and churchwardens shall take the said parchment book out of the said coffer, and the minister in the presence of the churchwardens shall write and record in the said book, the names of all persons christened, together with the names and surnames of their parents, and also the names of all persons married and buried in that parish, in the week before, and the day and year of every such christening, marriage, and burial; and that done, they shall lay up that book in the coffer as before: And the minister and churchwardens, unto every page of that book, when it shall be filled with such inscriptions, shall subscribe their names. And the churchwardens shall once every year, within one month after the five and twentieth day of March, transmit unto the bishop of the diocese or his chancellor, a true copy of the names of all persons christened married or buried in their parish in the year before (ended the said five and twentieth day of March), and the certain days and months in which every such christening marriage and burial was had, to be subscribed with the hands of the said minister and churchwardens, to the end the same may faithfully be preserved in the registry of the said bishop; which certificate shall be received without fee. And if the minister or churchwardens shall be negligent in performance of any thing herein contained; it shall be lawful for the bishop or his chancellor to convent them, and proceed against every of them as contemners of this our constitution.*

Shall write and record in the said book] Which book is good evidence, and the falsifying of it is punishable at common law. *Gibbs. 204.*

the

The names of all persons christened, and also of all persons married and buried within that parish] That is to say, at the parish church there: for when this canon was made, and for all the time before, there was none christened, married, or buried elsewhere; except amongst the papists, in whom it was very penal so to do; and the registering and authenticating an act against law could not be intended. Nor doth any thing in the act or toleration require the parish minister to register the christenings marriages or burials of any protestant dissenters, which are not performed in the church according to the rites of the church of England. And it seemeth incongruous and unjustifiable for him, to make a record of that, which possibly, and very probably, he knoweth nothing of.

2. By the 26 G. 2. c. 33. For preventing undue entries and abuses in registers of marriages; the churchwardens and chapelwardens of every parish or chapelry shall provide proper books of vellum, or good and durable paper, in which all marriages and banns of marriage respectively, there published or solemnized, shall be registred; and every page thereof shall be marked at the top, with the figure of the number of every such page, beginning at the second leaf with number one; and every leaf or page so numbred shall be ruled with lines at proper and equal distances from each other, or as near as may be; and all banns and marriages published or celebrated in any church or chapel, or within any such parish or chapelry, shall be respectively entred registred printed or written upon, or as near as conveniently may be to such ruled lines, and shall be signed by the parson vicar minister or curate, or by some other person in his presence, and by his direction; and such entries shall be made as aforesaid, on or near such lines in successive order, where the paper is not damaged or decayed by accident or length of time, until a new book shall be thought proper or necessary to be provided for the same purposes, and then the directions aforesaid shall be observed in every such new book: and all books provided as aforesaid, shall be deemed to belong to every such parish or chapelry respectively, and shall be carefully kept and preserved for publick use. f. 14.

And in order to preserve the evidence of marriages, and to make the proof thereof more certain and easy, and for the direction of ministers in the celebration of marriages and registering thereof, it is enacted, that all marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same; and that immediately after the celebration of every marriage, an entry thereof shall be made in such register to be kept as aforesaid; in which entry or register it shall be expressed, that the said marriage was celebrated by banns or licence; and if both or either of the parties married by licence be under age, with consent of the parents or guardians as the case shall be; and shall be signed by the minister with his proper addition, and also by the parties married, and attested by such two witnesses; which entry shall be made in the form or to the effect following;

Register book.

A. B. of ^[the]_[this] parish — and C. D. of ^[the]_[this] parish — were married
in this ^[church]_[chapel] by ^[banns]_[licence] with consent of ^[parents]_[guardians] this — day of
— in the year —

by me J. J. ^[Rector]_[Vicar]
Curate

This marriage was solemnized between us ^[A. B.]_[C. D.] in the presence of ^[E. F.]_[G. H.]
f. 15.

And if any person shall, with intent to elude the force of this act, knowingly and wilfully insert, or cause to be inserted in the register book of such parish or chapelry as aforesaid, any false entry of any matter or thing relating to any marriage; or falsly make alter forge or counterfeit any such entry in such register, or cause or procure the same to be done, or act or assist therein; or utter or publish as true any such false altered forged or counterfeited register as aforesaid, or a copy thereof, knowing the same to be false altered forged or counterfeited; or shall wilfully destroy, or cause or procure to be destroyed, any register book of marriages, or any part of such register book, with intent to avoid any marriage, or to subject any person to any of the penalties of this act; he shall be guilty of felony without benefit of clergy. f. 16.

Of burials in
particular.

3. By the 30 C. 2. c. 3. for burying in woollen, it is enacted, that the minister of every parish shall keep a register, in a book to be provided at the charge of the parish, and make a true entry of all burials within his parish, and of all affidavits of persons being buried in woollen brought unto him according to the said act; and where no such affidavit shall be brought unto him within the time therein limited, he shall enter a memorial thereof in the said registry, against the name of the party interred, and of the time when he notified the same to the churchwardens or overseers of the poor according to the said act. f. 7.

E. 6 G. 2. *Dormer and Ekyns.* Mr *Abney* moved for an information in the court of king's bench, against Mr *Ekyns*, rector of the parish church of Walton, and against Mr *Bonner* curate of the same church, for refusing to give Mr *Dormer* copies of certain parts of a register belonging to that parish, and likewise for refusing to give him a certificate of certain persons of the family of the *Dormers* being born in that parish. He said, that an ejectment was depending in this court, at the time this refusal was made, and still continued to be so, between Mr *Dormer* and Mr *Parkerson* and his wife, concerning certain lands which the plaintiff claimed as heir male of the *Dormer* family. Several of that family were born in the parish of Walton; and for this reason it was necessary to have copies of several parts of the register, and likewise a certificate of the birth of many in that family. Accordingly Mr *Dormer* made his application

cation to the rector and curate of that parish for this purpose, and offered to pay them for the same; but they refused letting him have them; and the only reason they gave was, that Mr Parkerson and his wife were the defendants, and they would do nothing to their prejudice. Of this fact he said he had an affidavit; and for such an extraordinary denial of justice he hoped the court would grant an information. The court said, you have a right to inspect the publick books of the parish; but cannot oblige the rector or curate to make you out either copies of those books, or a certificate; for which reason, they could not grant the motion. Upon this he changed his motion, and desired a rule to inspect those books. The court said, motions to inspect the publick books of corporations, they grant without an affidavit; but in motions to inspect the publick books of a parish, an affidavit is always requisite. By such affidavit, they said too, it must be sworn, that the copies of them are necessary to be produced in evidence at a trial of a cause depending, and likewise that the inspection of those books to take copies has been demanded and refused. Now in the present case, the first part was sworn to, but not the latter; for which reason the court refused to make any rule at present. 2 Barnard. 269.

[Note, the register book belongs to the parish, and the incumbent alone is not intrusted with the keeping of it, much less the curate. But by the canon abovementioned it is to be kept under three locks, the key of one only of which locks the minister is to keep, and the churchwardens the other two. So that the application in such case, as it seemeth, ought to be to the minister and churchwardens.]

Repair of the church. See Church.

Residence.

1. *OTHO.* The bishops shall provide, that in every church there shall be one resident, who shall take care of the cure of souls, and exercise himself profitably and honestly in performing divine service and administration of the sacraments. *Athon* 36. Residence by canon.

The rule of the ancient canon law was, that if a clergyman deserted his church or prebend, without just and necessary cause, and especially without the consent of the diocesan, he should be deprived. And agreeable hereunto was the practice in this realm; for tho' sometimes the bishop proceeded only to sequestration or other censures of an inferior nature, yet the more frequent punishment was deprivation. *Gibf.* 827.

2. Regularly, personal residence is required of ecclesiastical persons upon their cures; and to that end, by the common law, if he that hath a benefice with cure be chosen to an office of bailiff, or bedle, or the like secular office, he may have the king's writ for his discharge. *2 Inst.* 625. Residence by the common law.

For the intendment of the common law is, that a clerk is resident upon his cure; infomuch that in an action of debt brought against J. S. rector of D. the defendant pleading that he was demurrant and conversant at B. in another county, the plea was over-ruled; for since the defendant denied not that he was rector of the church of D. he shall be deemed by law to be demurrant and conversant there for the cure of souls. 2 Inst. 625.

Residence by
statute.

3. By the statute of *articuli cleri*, 9 Ed. 2. ft. 1. c. 8. In the articles exhibited by the clergy, one is as follows: *Also barons of the king's exchequer, claiming by their privilege, that they ought to make answer to no complainant out of the same place, do extend the same privilege unto clerks abiding there, called to orders or unto residence, and inhibit ordinaries that by no means or for any cause, so long as they be in the exchequer, or in the king's service, they shall not call them to judgment: Unto which it is answered, It pleaseth our lord the king, that such clerks as attend in his service, if they offend, shall be corrected by their ordinaries, like as other; but so long as they are occupied about the exchequer, they shall not be bound to keep residence in their churches: And this is added of new by the king's council; The king and his ancestors, since time out of mind, have used that clerks which are employed in his service, during such time as they are in service, shall not be compelled to keep residence at their benefices; and such things as be thought necessary for the king and commonwealth, ought not to be said to be prejudicial to the liberty of the church.*

If they offend] This extendeth only to offences or crimes, whereof the ecclesiastical court hath cognizance, as heresy, adultery, and the like; which the ordinary may correct: and not unto civil actions. 2 Inst. 624.

Added of new by the king's council] By this is meant the parliament, or common council of the realm, as it is termed in original writs, and in other legal records, and so it is taken in other acts of parliament, and in the preamble of this act also. 2 Inst. 624.

That clerks which are employed in his service] This is general, and not limited (as the former is) to the privilege of the exchequer; but extendeth to any other service for the king and commonwealth: as if he be employed as an ambassador into any foreign nation, or the like service of the king, which is for the publick, which ever must be preferred before the private. 2 Inst. 624.

The king and his ancestors since time out of mind have used] The clergy in this parliament inveighing vehemently against this answer, and that it tended to the breach of the ecclesiastical liberty, which was granted to them by magna charta, and often confirmed by other acts of parliament, that *the church of England shall be free*; to this it was answered, that the words subsequent in the magna charta explained these words, and *shall have all her whole rights and liberties inviolable*; so as the clergy cannot claim any right but *jus suum*, nor any liberty but *libertates suas* (as the words are): and the point here in question, viz. to proceed against a clerk for non-residence, whilst he was in the king's service for the commonwealth, was
neither

neither *jus suum*, nor *libertas sua*, but *libertas regis*. And therefore the parliament thought it fit to declare, that the king and his ancestors had used this liberty or prerogative time out of mind: and where it was said, that this tended to the prejudice of the liberty of the church, the parliament thereto answered (which is whorthy, lord Coke says, to be written in letters of gold), *Such things as be thought necessary for the king and commonwealth, ought not to be said to be prejudicial to the liberty of the church.*
2 Inst. 624.

By the 21 H. 8. c. 13. commonly called the statute of non-residence: *As well every spiritual person, now being promoted to any archdeaconry deanry or dignity in any monastery, or cathedral church, or other church conventual or collegiate, or being beneficed with any parsonage or vicarage; as all and every spiritual person and persons, which hereafter shall be promoted to any of the said dignities or benefices, with any parsonage or vicarage, shall be personally resident and abiding in at and upon his said dignity, prebend, or benefice, or at any one of them at the least; and in case he shall not keep residence at one of them as aforesaid, but absent himself wilfully by the space of one month together, or by the space of two months to be at several times in any one year, and make his residence and abiding in any other places by such time; he shall forfeit for every such default 10l, half to the king, and half to him that will sue for the same in any of the king's courts by original writ of debt bill plaint or information, in which action and suit the defendant shall not wage his law nor have any esjoin or protection allowed.* §. 26.

And if any person or persons shall procure at the court of Rome, or elsewhere, any licence or dispensation to be non-resident at their said dignities, prebends, or benefices, contrary to this act; every such person, putting in execution any such dispensation or licence for himself, shall incur the penalty of 20l for every time so doing, to be forfeited and recovered as aforesaid, and such licence or dispensation shall be void. §. 27.

Provided, that this act of non-residence shall not extend nor be prejudicial to any such spiritual person as shall chance to be in the king's service beyond the sea, nor to any person going to any pilgrimage or holy place beyond the sea, during the time that they shall so be in the king's service, or in the pilgrimage going and returning home; nor to any scholar or scholars being conversant and abiding for study, without fraud or covin, at any university within this realm or without; nor to any of the chaplains of the king or queen, daily or quarterly attending and abiding in the king's or queen's most honourable household; nor to any of the chaplains of the prince or princess, or any of the king's or queen's children, brethren, or sisters, attending daily in their honourable households, during so long as they shall attend in any of their households; nor to any chaplain of any archbishop or bishop, or of any spiritual or temporal lords of the parliament, daily attending abiding and remaining in any of their honourable households; nor to any chaplain of any dukes, marquesses, countesses, viscounts, or baronesses, attending daily and abiding in any of their honourable households; nor to any chaplain of the lord chancellor, or treasurer of England, the king's chamberlain, or steward of his household for the time being, the treasurer and controller of the king's most honourable household for the time being,
attending

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attending daily in any of their honourable households; nor to any chaplain of any of the knights of the honourable order of the garter, or of the chief justice of the king's bench, warden of the ports, or of the master of the rolls, nor to any chaplain of the king's secretary, dean of the chapel, amner for the time being, daily attending and dwelling in any their households, during the time that they shall so abide and dwell without fraud or covin, in any of the said honourable households; nor to the master of the rolls, or dean of the arches, nor to any chancellor or commissary of any archbishop or bishop, nor to as many of the twelve masters of the chancery and twelve advocates of the arches as shall be spiritual men, during so long time as they shall occupy their said rooms and offices; nor to any such spiritual persons as shall happen by injunction of the lord chancellor, or the king's council, to be bound to any daily appearance and attendance to answer to the law, during the time of such injunction. f. 28.

Provided also, that it shall be lawful to the king, to give licence to every of his own chaplains, for non-residence upon their benefices; any thing in this act to the contrary notwithstanding. f. 29.

Provided also, that every dutchess, marquess, countess, baroness, widows, which shall take any husbands under the degree of a baron, may take such number of chaplains as they might have done being widows; and that every such chaplain may have like liberty of non-residence, as they might have had if their said ladies and mistresses had kept themselves widows. f. 33.

Promoted to any archdeaconry, deanry, or dignity] Archdeaconries and deanries being mentioned first, the word dignity (according to the common rule of the interpretation of statutes) shall not extend to higher degrees, as to archbishops or bishops; but only to dignities of the like or inferior nature to those specified. But if a bishop be also an archdeacon, dean, or other inferior dignitary (not excepted by this statute) by commendam; he is, as such, punishable by this statute for non-residence. *Gibf. 886.*

Dignity] E. 41 Eliz. *Broughton and Gousley.* Information upon the statute for non-residence. The defendant pleaded, that he was chosen gospeller in the church of St Paul, London; and was resident there by reason of that dignity. And it was thereupon demurred. It was argued for the plaintiff, that this was not any dignity to excuse the defendant. The civilians divided spiritual functions into three degrees; 1. A function which hath jurisdiction; as bishop, or dean. 2. A spiritual administration with a cure; as parson of a church. 3. They who have neither cure nor jurisdiction; as prebendaries, chaplains, and such like. And they defined a dignity to be, an ecclesiastical administration, with jurisdiction or power conjoined; and thereby they excluded the two last degrees from being any dignity: à multo fortiori, the common law doth so; and for that purpose were cited divers cases where it was shewn, that an archdeacon is not a name of dignity; that a parson is not a name dignity; a provost; a precentor; a chaplain: and particularly, that if a vicar of St Paul's hath a benefice with cure, he ought to be resident upon it; and yet that this is a greater dignity than gospeller. And of that opinion were Popham and Clinch (the other justices being absent), that it was not a dignity

nity within this statute. But they would advise upon hearing the defendant's counsel. And it was adjourned. But afterwards the defendant compounded. *Cro. Eliz.* 663.

Benefices, with any parsonage or vicarage] The sense being somewhat imperfect as these words stand, and the words differing in form of expression from the foregoing part of the sentence; there seemeth to have been a mistake either in the record or in the transcript, and that the words should stand thus, *beneficed with any parsonage or vicarage.*

Shall be personally resident] In the case of *Sands* and *Pinder*, *M. 44 Eliz.* Where the parson claimed a way from his house to a hamlet there named, and it was not alledged in his plea in what vill the said house was; it was nevertheless adjudged to be good, upon this reason, that the parson should be always intended to be resident within his parsonage. *Cro. Eliz.* 898.

Or at any one of them at the least] So that persons who have a plurality of benefices with cure, or those who have a benefice and dignity, or benefices and dignities, are not punishable for non-residence by this statute, if they be duly resident upon any one dignity or benefice. *Gibf.* 886.

By the ancient canon law, where a benefice was *annexed* to a dignity or prebend, the person was not obliged to residence upon the benefice, but at the superior church, where his attendance was supposed to be more immediately necessary. *Gibf.* 887.

But absent himself wilfully] So that if he hath no parsonage house, or remove by advice of his physician for better air in order to the recovery of his health, or be removed and detained by imprisonment, or the like; he is not punishable within this statute, which supposeth the absence to be voluntary. Inasmuch that an information upon the statute hath been adjudged insufficient, for want of the word *wilfully* expressly inserted, which the court agreed was of force, and must be in of necessity. *Gibf.* 887.

And make his residence and abiding in any other places] Altho' by the statute of the 13 *Eliz. c. 20.* where the words are *ordinarily resident and serving the cure*, a parson may live in another parish, and yet the *lease* shall not be void, in case he serve and attend his cure, at the proper seasons; yet by this statute, where the words are, that he shall be *abiding in at and upon*, and *not abiding in any other place*, it is not only non-residence to dwell in another parish, in case the incumbent hath a parsonage house to dwell in, but it is also non-residence to dwell in another house of the same parish. Because the statute was made, not only that the cure should be served, and hospitality maintained; but also that the parsonage house should be upholden, and preserved in a condition fit for incumbents to live in, which cannot ordinarily be supposed, if the present incumbent doth not inhabit it. And if the statute should be otherwise construed,

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construed, many inconveniences would ensue. For parsons would purchase other houses within their parishes, and be always resident upon them, and suffer their parsonage houses to decay, and impoverish their glebe, and enrich their own possessions, in prejudice of their successors. *Gibf. 887.*

For these reasons, tho' the incumbent in one case, demising the parsonage house, reserved a chamber to himself; and in another case, held the whole parsonage house in his own hands and occupation, and kept it in good repair; yet both these were affirmed to be non-residence within this statute: because it appeared, that the incumbents were personally resident in other houses; even tho', in the second case, the house he resided in was within twenty yards of the rectory; and the first also was in the same town. *Gibf. 887. 2 Brownl. 54.*

He shall forfeit for every such default 101] This (Dr Gibson observes) is a coercion upon incumbents, which may be used by any person or persons whatsoever; and doth not supersede or affect the right that the ordinary hath, by the laws of the church, to punish non-residence by ecclesiastical censures; which (in case of obstinacy on the part of the incumbent) may be carried (as was said before) to deprivation. *Gibf. 887.*

But this hath been denied by others, who contend, that the statute supersedeth the canon law in this particular, and is now the only rule and measure of proceeding. The reasons which have been alledged on each side, will fall in after the three next statutes, which are supplementary to, and illustrate in some respects this statute.

In any of the king's courts] That is, as is further expressed, where there may be essoin, wager of law, and protection; and therefore not before the justices of assize, or of oyer and terminer. *Gibf. 887.*

So in the case of *Garland and Burton, M. 12 G. 2.* An information was brought at the assizes, against the defendant for non-residence upon this statute; by which the action is given to him that will sue in any of the king's courts, by bill plaint or information, in which no essoin is to be allowed. And upon demurrer the court held, that it would not lie at the assizes, but must be brought in the king's bench. For the 21 *Ja. c. 17.* never intended to give a new jurisdiction to the assizes, in cases where they had it not before. *Str. 1103.*

Shall procure at the court of Rome, or elsewhere, any licence or dispensation to be non-resident, contrary to this act] In our ecclesiastical records, we find abundance of licences for non-residence, granted by the ordinaries, on account of attendance upon bishops, abbots, earls, barons, and the like; which licences were so limited, as to continue in force for a year, or two, or three, or so long as they should continue in their lords service. And the provisos in this act (Dr Gibson observes, according to the foregoing doctrine) being only exemptions from the penalties of it, the same canonical obligation (he says) rests upon those, as well as other incumbents, who desire at any time to be non-resident on such occasions, namely, to pray and obtain the licence of the bishop, and to return to residence when

when cited and admonished by him; or otherwise to be liable to ecclesiastical censures, in such manner as they were before the making of this act. *Gibb. 887.*

To any person going to any pilgrimage] It is thought fit here, and in the subsequent clauses, to recite the exceptions at large, that the whole taken together may be the better understood; notwithstanding that divers of these particulars are now of no signification, as this (for instance) concerning pilgrimages, and those in some of the following statutes concerning the officers of the court of augmentations, the master of wards and liveries, and the like, which are now abolished by act of parliament.

Nor to any scholar being conversant and abiding for study, without fraud or covin, at any university] Instances of such licences in the ecclesiastical records are without number; but because they were much abused, to the cloaking of idleness and dissolute living, under pretence of study, they were specially regulated and limited by the statute of the 28 H. 8. c. 13. hereafter following.

Nor to any chaplain of any archbishop or bishop, or of any spiritual or temporal lords of the parliament] The service of the bishop is allowed by the canon law to be a sufficient licence for non-residence: For the necessary care and business of a diocese do require, that the bishop should have the assistance of one or more discreet clergymen. And since it is much easier to find a proper curate to serve a parish, than a proper person to advise and assist the bishop in the general care of the diocese; the law considers the person who abides with the bishop for these purposes, as more usefully employed, than if he were confined to the care of one parish only. *Bishop Sherlock's charge in the year 1759. page 9.*

And the statute hath extended this exemption to other cases not expressly mentioned in the canon law; as to the chaplains of the nobility and great officers of the crown: tho' cases of this kind had usually been dispensed with before the act; which dispensations were founded upon the general power reserved to the bishop by the canon law, to dispense where there appeared to him to be *a just and reasonable cause*. And since the virtue and example of great and potent families will necessarily have a great influence upon the manners and religion of any country; it was thought reasonable, to dispense with the personal attendance of an incumbent in his parish, whilst he was employed in performing the offices of his function in such families. *id. p. 9, 10.*

During the time that they shall so abide and dwell without fraud or covin, in any of the said honourable households] The statute considers the service of the chaplain in the household of his lord, as the only ground of the exemption; and it cannot be doubted (*Dr Sherlock says*), but that such service is only meant, as is proper and peculiar to the office of chaplain. And therefore a mere retainer (*he says*) of a clergyman to be chaplain to a nobleman, unless he actually abides and dwells in the household, is no title to the exemption of the statute; and if one retained and titled chaplain abides in the household to do any *other* service, and not the service

of a chaplain, it is not such an abiding as the statute intends, but is fraudulent and covinous. *id.* p. 10, 11.

It shall be lawful to the king to give licence to every of his own chaplains for non-residence] In the former parts of the act it was expressed, that the several chaplains therein mentioned might be dispensed withal for their non-residence, during such time only as they should be and remain in the household of those who retained them: but this clause seemeth to contain one exception to that limitation, with regard to the chaplains of the king; who may (as it seemeth) by this clause give licence to any of his own chaplains for non-residence generally, and not only during the time of their attendance in the household: And this proviso seemeth only to be a saving of the king's right which he had before, as is set forth in the answer to one of the articuli cleri before mentioned, and in the comment thereupon.

Shall take any husbands under the degree of a baron] If any of these retaineth chaplains, according to this statute, and afterwards taketh to husband one of the nobility (as it was in *Atton's* case, where the baroness Mounteagle, after such retainer, took to husband the lord Compton); the retainer remaineth in force, notwithstanding such marriage, and the chaplains, so long as they tend upon her shall not be adjudged non-residents within this act. 4 Co. 117.

By the 25 H. 8. c. 16. *Whereas by the statute of the 21 H. 8. c. 13. it was ordained, that certain honourable persons, as well spiritual as temporal, shall have chaplains beneficed with cure to serve them in their honourable houses, which chaplains shall not incur the danger of any penalty or forfeiture made or declared in the same parliament, for non-residence upon their said benefices; in which act no provision was made for any of the king's judges of his high courts, commonly called the king's bench and the common place, except only for the chief judge of the king's bench, nor for the chancellor nor the chief baron of the king's exchequer, nor for any other inferior persons being of the king's most honourable council: It is therefore enacted, that as well every judge of the said high courts, and the chancellor and chief baron of the exchequer, the king's general attorney and general solicitor, for the time that shall be, shall and may retain and have in his house, or attendant to his person, one chaplain having one benefice with cure of souls, which may be absent from his said benefice, and not resident upon the same; the said statute made in the said one and twentieth year, or any other statute, act, or ordinance to the contrary notwithstanding.*

By the 28 H. 8. c. 13. *Whereas divers persons, under colour of the proviso in the act of the 21 H. 8. c. 13. which exempteth persons conversant in the universities for study, from the penalty of non-residence contained in the said act, do resort to the universities, where under pretence of study they live dissolutely, nothing profiting themselves by study at all, but consume the time in idleness and other pastimes; it is enacted, that all persons who shall be to any benefice or benefices promoted as is aforesaid, being above the age of forty years* (the

(the chancellor, vice-chancellor, commissary of the said universities, wardens, deans, provosts, presidents, rectors, masters, principals, and other head rulers of colleges, halls, and other houses or places corporate within the said universities, doctors of the chair, readers of divinity in the common schools of divinity in the said universities, only excepted) shall be resident and abiding at and upon one of their said benefices, according to the intent and true meaning of the said former act, upon such pain and penalties as be contained in the said former act, made and appointed for such beneficed persons for their non-residence; and that none of the said beneficed persons, being above the age aforesaid, except before except, shall be excused of their non-residence upon the said benefices, for that they be students or residents within the said universities; any proviso, or any other clause or sentence contained in the said former act of non-residence, or any other thing to the contrary in any wise notwithstanding.

And further, that all and singular such beneficed persons, being under the age of forty years, resident and abiding within the said universities, shall not enjoy the privilege and liberty of non-residence, contained in the proviso of the said former act, unless he or they be present at the ordinary lecture and lectures, as well at home in their houses, as in the common school or schools, and in their proper person keep sophisms, problems, disputations, and other exercises of learning, and be opponent and respondent in the same, according to the ordinances and statutes of the said universities; any thing contained in the said proviso, or former act to the contrary notwithstanding.

Provided always, that nothing in this act shall extend to any person who shall be reader of any publick or common lecture in divinity, law civil, physick, philosophy, humanity, or any of the liberal sciences, or publick or common interpreter or teacher of the hebrew tongue, chaldee, or greek; nor to any persons above the age of forty years, who shall resort to any of the said universities to proceed doctors in divinity, law civil, or physick, for the time of their said proceedings, and executing of such sermons, disputations, or lectures, which they be bound by the statutes of the universities there to do for the said degrees so obtained.

By the 33 H. 8. c. 28. Whereas by the act of the 21 H. 8. c. 13. it was ordained, that certain honourable persons, and other of the king's counsellors and officers, as well spiritual as temporal, should and might have chaplains beneficed with cure, to serve and attend upon them in their houses, which chaplains shall not incur the danger of any penalty or forfeiture made or declared in the said act for non-residence upon their said benefices; in which act no provision is made for any of the head officers of the king's courts of the dutchy of Lancaster, the courts of augmentations of the revenues of the crown, the first fruits and tenths, the master of his majesty's wards and liveries, the general surveyors of his lands, and other his majesty's courts; It is therefore enacted, that the chancellor of the said court of the dutchy of Lancaster, the chancellor of the court of augmentations, the chancellor of the court of first fruits and tenths, the master of his majesty's wards and liveries, and every of the king's general surveyors of his lands, the treasurer of his chamber, and the groom of the stole, and every of them, shall and may retain in his house, or attendant unto his person, one chaplain having one benefice with cure of souls

Residence.

which may be absent from the said benefice, and non-resident upon the same; *the said statute made in the said twenty first year of his majesty's reign, or any other statute, act, or ordinance to the contrary notwithstanding.*

Provided always, that every of the said chaplains so being beneficed as aforesaid, and dwelling with any the officers aforesaid, shall repair twice a year at the least to his said benefice and cure, and there abide for eight days at every such time at the least, to visit and instruct his said cure; on pain of 40 sh. for every time so failing, half to the king, and half to him that will sue for the same in any of the king's courts of record, in which suit no essoin protection or wager of law shall be allowed.

And here the question comes to be reconsidered, How far these statutes, taken together, do supersede the canon law, so as to take away the power which the ordinary had before, of injoining residence to the clergy of his diocese. It seems to be clear, that before these statutes, the bishops of this realm had and exercised a power of calling their clergy to residence; but more frequently, they did not exert this power, which so far forth was to the clergy a virtual dispensation for non-residence. But this not exerting of their power was in them not always voluntary; for they were under the controlling influence of the pope, who granted dispensations of non-residence to as many as would purchase them, and disposed of abundance of ecclesiastical preferments to foreigners who never resided here at all. The king also, as appears, had a power to require the service of clergymen; and consequently in such case to dispense with them for non-residence upon their benefices. This power of the king is reserved to him by the aforesaid act of the 21 H. 8. c. 13. But it is the power of dispensation in the two former cases which is intended to be taken away, namely, by the bishop, and by the pope; and by the said act residence is enjoined to the clergy under the penalty therein mentioned, notwithstanding any dispensation to the contrary from the court of Rome or elsewhere; with a proviso nevertheless, that the said act shall not extend nor be prejudicial to the chaplains and others therein specially excepted. It is argued, that this act being made to rectify what had been insufficient or ineffectual in the canon law, and inflicting a temporal penalty to enforce the obligation of residence, the parliament intended that the said act should be from thenceforth, if not the sole, yet the principal rule of proceeding in this particular; and consequently, that the persons excepted in the act need no other exemption than what is given to them by the act for their non-residence. Unto this it is answered, that the intention of the act was not to take away any power which the bishop had of injoining residence, but the contrary; namely, it was to take away that power which the bishop or pope exercised of granting dispensations for non-residence; that is to say, the act left to them that power which was beneficial, and only took from them that which tended to the detriment of the church; and consequently, that the bishop may injoin residence to the clergy as he might before, only he may not dispense with them as he did before for non-residence. And indeed, from any thing that appears upon the face of the act, the contrary supposition seemeth to bear somewhat hard against the rule which hath generally been adhered to

to in the construction of acts of parliament, that an act of parliament in the affirmative doth not take away the ecclesiastical jurisdiction, and that the same shall not be taken away in any act of parliament but by express words. It is therefore further urged, that the three subsequent acts do explain this act, and by the express words thereof do establish the foregoing interpretation. In the first of the three it is said, that the persons therein mentioned may retain one chaplain *which may be absent from his benefice, and not resident upon the same*; in the second, it is said, that persons above forty years of age residing in the universities *shall not be excused of their non-residence*, and again, that persons under forty years of age *shall not enjoy the privilege of non-residence contained in the proviso of the said former act*, unless they perform the common exercises there, and the like, which implies, that if they do this, they shall enjoy such privilege: and in the third, it is said, that the persons therein mentioned may retain one chaplain *which may be absent from his benefice, and non-resident upon the same*; and it is not to be supposed, that the parliament intended a greater privilege to the chaplains of the inferior officers mentioned in the said last act, than to the chaplains of the royal family and principal nobility mentioned in the first act. Unto this the most apposite answer seemeth to be, that it is not expressed absolutely in any of the said three acts, that the chaplains or others therein mentioned shall enjoy the privilege of non-residence, or may be absent from their benefices, and not resident upon the same; but only this, that they may be absent or non-resident as aforesaid, *the said statute made in the said twenty first year, or any other statute or ordinance to the contrary notwithstanding*. So that they are only exempted thereby from the restraints introduced by the statute law; but in other respects are left as they were before.—But concerning this, altho' it is a case likely enough to happen every day, there hath been no adjudication.

4. Peccham. *We do decree, that rectors who do not make personal residence in their churches, and who have no vicars, shall exhibit the grace of hospitality to their stewards according to the ability of the church; so that at least the extreme necessity of the poor parishioners be relieved; and they who come there, and in their passage preach the word of god, may receive necessary sustenance, that the churches be not justly forsaken of the preachers through the violence of want: for the workman is worthy of his meat, and no man is obliged to warfare at his own cost.* Hospitality to non-residents.

Who do not make personal residence] That is, altho' they be licensed to non-residence by their bishops or others to whom it appertaineth. For if they be non-resident without licence, they are not only bound to the observance of this constitution, but otherwise may be proceeded against according to law. *Lind. 132.*

And who have no vicars] This intimates, that they who have vicars in their benefices, are excused from personal residence: And this may be well admitted, where the parish church is annexed to a prebend or dignity; for then the principal is excused by the vicar from personal residence; and the reason is, because he is bound to reside in his greater benefice.

Residence.

benefice. But this reason (saith Lindwood) doth not hold, where in a church there is a rector and vicar, which church doth not depend on any other church; wherefore he who hath such church is not excused from residence by the vicar which he hath there: Nor doth it make against this, if it be alledged, that such rector hath not the cure of souls, but the vicar; for habitually, and in propriety, the cure of souls is in the principal rector; and in the vicar only, as to the exercise and effect thereof. *Lind. 132.*

Who come there, and in their passage preach the word of god] This constitution was made by Peccham, in favour of his own brethren the friars, who travelled under the pretence of preaching. Lindwood here bears hard upon them, for fauntering up and down in the parishes where they preached, and begging the people's alms after they had received what was sufficient at the parsonage house. *Johns. Pecch. Lindw. 133.*

Preach the word of god] That is, if they be licensed and lawfully sent to preach. *Lind. 133.*

Lease of non-
residents.

5. By the 13 Eliz. c. 20. *That the livings appointed for ecclesiastical ministers may not by corrupt and indirect dealings be transferred to other uses, it is enacted, that no lease to be made of any benefice or ecclesiastical promotion with cure, or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be ordinarily resident, and serving the cure of such benefice, without absence above fourscore days in any one year; but every such lease, immediately upon such absence, shall cease and be void; and the incumbent so offending shall for the same lose one year's profit of his said benefice, to be distributed by the ordinary among the poor of the parish: And all chargings of such benefices with cure with any pension, or with any profit out of the same to be yielded or taken, other than rents reserved upon leases, shall be void. f. 1.*

Provided, that every parson by the laws of this realm allowed to have two benefices, may demise the one of them upon which he shall not then be most ordinarily resident, to his curate only that shall serve the cure for him: but such lease shall endure no longer than during such curate's residence without absence above forty days in any one year. f. 2.

H. 1725. Mills and Eiberidge. Bill by the lessee of Matthew Hawes, clerk, setting forth his lease dated Feb. 4. 1723, for the tithes for 1724 and 1725 in the parish of Simpson in the county of Buckingham. The defendant pleaded, that it appears by the plaintiff's bill, that his lease was dated Feb. 4. 1723; then pleads the statute of the 13 Eliz. c. 20. and avers, that Matthew Hawes the lessor was absent from his benefice eighty days and more in one year since the lease, and before the filing of the bill; that the church of Simpson is not impropriate; and that it is a benefice or ecclesiastical promotion with cure; and therefore by such non-residence, and by virtue of the said act, that the lease was void. And the plea was allowed: and it was determined, that there is no necessity to aver that the absence was voluntary (for if it was otherwise, it lay upon the plaintiff to shew it); or to aver, that the absence was eighty days together. *Bunb. 210.*

The same plea came on *E.* 1726, in the case of *Quilter* and *Lowndes*, and allowed by the whole court. *Bunb.* 211.

But, query, says the reporter, if this is a good plea if the rector and lessee join; for by non-residence *before sentence* he only forfeits his lease and rent, not his tithes. *Atkinson and Prodgers v. Peasley.* *Bunb.* 211.

6. Bishops (as was observed before) are not punishable by the statute of the 21 *H.* 8. for non-residence upon their bishopricks; but altho' an archbishop or bishop be not tied to be resident upon his bishoprick by the statute; yet they are thereto obliged by the ecclesiastical law, and may be compelled to keep residence by ecclesiastical censures. *Watf. c.* 37.

Thus, by a constitution of archbishop Langton: *Bishops shall be careful to reside in their cathedrals, on some of the greater feasts, and at least in some part of Lent, as they shall see to be expedient for the welfare of their souls.* *Lind.* 130.

And by a constitution of Otho: *What is incumbent upon the venerable fathers the archbishops and bishops by their office to be done, their name of dignity, which is that of bishop (episcopus) or superintendant, evidently expresseth. For it properly concerns them (according to the gospel expression) to watch over their flock by night. And since they ought to be a pattern by which they who are subject to them ought to reform themselves, which cannot be done unless they shew them an example; we exhort them in the lord, and admonish them, that residing at their cathedral churches, they celebrate proper masses on the principal feast days, and in Lent, and in Advent. And they shall go about their dioceses at proper seasons, correcting and reforming the churches, consecrating, and sowing the word of life in the lord's field. For the better performance of all which, they shall twice in the year, to wit, in Advent and in Lent, cause to be read unto them the profession which they made at their consecration.* *Athon* 55.

And by a constitution of Othobon: *Altho' bishops know themselves bound as well by divine as ecclesiastical precepts to personal residence with the flock of god committed to them; yet because there are some who do not seem to attend hereunto, therefore we pursuing the monition of Otho the legate, do earnestly exhort them in the lord, and admonish them in virtue of their holy obedience, and under attestation of the divine judgments, that out of care to their flock, and for the solace of the churches espoused to them, they be duly present, especially on solemn days, in Lent and in Advent; unless their absence on such days shall be required for just cause by their superiors.* *Athon* 118.

7. Can. 42. Every dean, master, or warden, or chief governor of any cathedral or collegiate church, shall be resident in the same fourscore and ten days conjunctim or divisim in every year at the least, and then shall continue there in preaching the word of god, and keeping good hospitality; except he shall be otherwise let with weighty and urgent causes to be approved by the bishop of the diocese, or in any other lawful sort dispensed with.

[To be approved by the bishop] By the ancient canon law, personal attendance on the bishop, or study in the university, was a just cause of non-residence; and as such, notwithstanding the non-residence, intitled them to all profits, except quotidian. *Gibf.* 172.

8. Can.

Of preben-
daries and
canons.

8. Can. 44. No prebendaries nor canons in cathedral or collegiate churches, having one or more benefices with cure (and not being residentiaries in the same cathedral or collegiate churches) shall, under colour of their said prebends, absent themselves from their benefices with cure above the space of one month in the year, unless it be for some urgent cause, and certain time to be allowed by the bishop of the diocese. And such of the said canons and prebendaries, as by the ordinances of the cathedral or collegiate churches do stand bound to be resident in the same, shall so among themselves sort and proportion the times of the year, concerning residence to be kept in the said churches, as that some of them always shall be personally resident there; and all those who be, or shall be residentiaries in any cathedral or collegiate church, shall, after the days of their residency appointed by their local statutes or customs expired, presently repair to their benefices, or some one of them, or to some other charge where the law requireth their presence, there to discharge their duties according to the laws in that case provided. And the bishop of the diocese shall see the same to be duly performed and put in execution.

So that besides the general laws directing the residence of other clergymen, these dignitaries have another law peculiar to themselves, namely, the local statutes of their respective foundations, the validity of which local statutes this canon supposeth and affirmeth. And with respect to the new foundations in particular, the act of parliament of the 6 An. c. 21. enacteth, that their local statutes shall be in force, so far as they are not contrary to the constitution of the church of England, or the laws of the land. This canon is undoubtedly a part of the constitution of the church: So that if the canon interfereth in any respect with the said local statutes, the canon is to be preferred, and the local statutes to be in force only so far forth as they are modified and regulated by the canon.

Of rectors
and vicars.

9. There doth not appear to be any difference, either by the ecclesiastical or temporal laws of this kingdom, between the case of a rector and of a vicar concerning residence; except only that the vicar is sworn to reside (with a proviso, unless he shall be otherwise dispensed withal by his diocesan), and the rector is not sworn. And the reason of this difference was this: In the council of Lateran held under Alexander the third, and in another Lateran council held under Innocent the third, there were very strict canons made against pluralities; by the first of these councils, pluralities are restrained, and every person admitted *ad ecclesiam, vel ecclesiasticum ministerium*, is bound to reside there, and personally serve the cure; by the second of these councils, if any person, having one benefice with cure of souls, accepts of a second, his first is declared void *ipso jure*. These canons were received in England, and are still part of our ecclesiastical law.

At the first appearance of these canons, there was no doubt made but they obliged all *rectors*; for they, according to the language of the law, had churches *in title*, and had *beneficium ecclesiasticum*; and of such the canons spoke. But *vicars* did not then look upon themselves to be bound by these canons, for they, as the gloss upon the decretals speaks, had not *ecclesiam quoad titulum*; and the text of the law describes them not as

having benefices, but as bound *personis et ecclesiis deservire*, that is, as assistant to the rector in his church.

Upon this notion a practice was founded, and prevailed in England, which eluded the canons made against pluralities. A man beneficed in one church could not accept another, without voiding the first; but a man possessed of a benefice could accept a vicarage under the rector in another church, for that was no benefice in law, and therefore not within the letter of the canon, which forbids any man holding two benefices.

The way then of taking a second living in fraud of the canon was this: A friend was presented, who took the institution, and had the church *quoad titulum*; as soon as he was possessed, he constituted the person vicar for whose benefit he took the living, and by consent of the diocesan allotted the whole profit of the living for the vicar's portion, except a small matter reserved to himself.

This vicar went and resided upon his first living, for the canon reached him where he had the *benefice*; but having no benefice where he had only a vicarage, he thought himself secure against the said canons requiring residence.

This piece of management gave occasion to several papal decrees, and to the following constitution of archbishop Langton; viz. *No ordinary shall admit any one to a vicarage, who will not personally officiate there.* — Lind. 64.

And to another constitution of the same archbishop, by which it is enjoined, that *vicars who will be non-resident shall be deprived.* Lind. 131.

But the abuse still continued, and therefore Otho, in his legatine constitutions, applied a stronger remedy, ordaining, that *none shall be admitted to a vicarage, but who renouncing all other benefices (if he hath any) with cure of souls, shall swear that he will make residence there, and shall constantly so reside: otherwise his institution shall be null, and the vicarage shall be given to another.* Athon 24.

And it is upon the authority of this constitution, that the oath of residence is administered to vicars to this day. And this obligation of vicars to residence was further enforced by a constitution of Othobon, as followeth: *If any shall detain a vicarage contrary to the aforesaid constitution of Otho, he shall not appropriate to himself the profits thereof, but shall restore the same; one moiety whereof shall be applied to the use of that church, and the other moiety shall be distributed half to the poor of the parish and half to the archdeacon. And the archdeacon shall make diligent inquiry every year, and cause this constitution to be strictly observed. And if he shall find that any one detaineth a vicarage contrary to the premisses, he shall forthwith notify to the ordinary that such vicarage is vacant, who shall do what to him belongeth in the premisses; and if the ordinary shall delay to institute another into such vicarage, he shall be suspended from collation institution or presentation to any benefices until he shall comply. And if any one shall strive to detain a vicarage contrary to the premisses, and persist in his obstinacy for a month; he shall, besides the penalties aforesaid, be ipso facto deprived of his other benefices (if he have any); and shall be disabled for ever to hold such vicarage which he hath so vexatiously detained, and from obtaining any other benefice for three years.*

Residence.

years. *And if the archdeacon shall be remiss in the premisses, he shall be deprived of the share of the aforesaid penalty assigned to him, and be suspended from the entrance of the church, until he shall perform his duty.* Athol 95.

So that, upon the whole, the doubt was not, whether rectors were obliged to residence; the only question was, whether vicars were also obliged: and to enforce the residence of vicars, in like manner as of rectors, the aforesaid constitutions were ordained. *Sherl. ibid. page 20, 21, 22.*

Of curates.

10. Can. 47. *Every beneficed man licensed by the laws of this realm, upon urgent occasions of other service, not to reside upon his benefice, shall cause his cure to be supplied by a curate that is a sufficient and licensed preacher, if the worth of the benefice will bear it. But whosoever hath two benefices, shall maintain a preacher licensed in the benefice where he doth not reside, except he preach himself at both of them usually.*

And by the last article of archbishop Wake's directions (which are inserted at large under the title *Ordination*), it is required, that the bishop shall take care, as much as possible, that whosoever is admitted to serve any cure, do reside in the parish where he is to serve; especially in livings that are able to support a resident curate: and where that cannot be done, that they do at least reside so near to the place, that they may conveniently perform all their duties both in the church and parish.

Of pluralists.

11. By the faculty of dispensation, a pluralist is required, in that benefice from which he shall happen to be most absent, to preach thirteen sermons every year; and to exercise hospitality for two months yearly, and for that time, according to the fruits and profits thereof, as much as in him lieth, to support and relieve the inhabitants of that parish, especially the poor and needy.

Of persons

presented by
the universities
to popish
livings.

12. By the 1 *W. c. 26.* If any person, presented or nominated by either of the universities to a popish benefice with cure, shall be absent from the same above the space of sixty days in any one year; in such case, the said benefice shall become void.

Resignation.

Resignation,
what.

FOR general bonds of resignation, see the title *Simony*.

1. A resignation is, where a parson, vicar, or other beneficed clergyman voluntarily gives up and surrenders his charge and preferment to those from whom he received the same. *Deg. p. 1. c. 14.*

To whom to
be made.

2. That ordinary who hath the power of institution, hath power also to accept of a resignation made of the same church to which he may institute; and therefore the respective bishop, or other person who either by patent under him or by privilege or prescription hath the power of institution, are the proper persons to whom a resignation ought to be made. And yet a resignation of a deanry in the king's gift, may be made to the king; as of the deanry of Wells. And some hold, that the resignation

nation may well be made to the king, of a prebend that is no donative: But others on the contrary have held, that a resignation of a prebend ought to be made only to the ordinary of the diocese, and not to the king as supreme ordinary; because the king is not bound to give notice to the patron (as the ordinary is) of the resignation; nor can the king make a collation by himself without presenting to the bishop, notwithstanding his supremacy. 2 Roll's Abr. 358. Watsf. c. 4.

And resignation can only be made to a superior: This is a maxim in the temporal law, and is applied by lord Coke to the ecclesiastical law, when he says, that therefore a bishop cannot resign to the dean and chapter, but it must be to the metropolitan, from whom he received confirmation and consecration. Gibf. 822.

And it must be made to the next immediate superior, and not to the mediate; as of a church presentative to the bishop, and not to the metropolitan. 2 Roll's Abr. 358.

But donatives are not resignable to the ordinary; but to the patron, who hath power to admit. Gibf. 822.

And if there be two patrons of a donative, and the incumbent resign to one of them, it is good for the whole. Deg. p. 1. c. 14.

3. Regularly, resignation must be made in person, and not by proxy. Whether it There is indeed a writ in the register, intituled, *littera procuratoria ad resignandum*, by which the person constituted proctor was enabled to do all things necessary to be done in order to an exchange; and of these things, resignation was one. And Lindwood supposeth, that any resignation may be made by proctor. But in practice, there is no way (as it seemeth) of resigning, but either to do it by personal appearance before the ordinary, or at least to do it elsewhere before a publick notary, by an instrument directed immediately to the ordinary, and attested by the said notary; in order to be presented to the ordinary, by such proper hand as may pray his acceptance. In which case, the person presenting the instrument to the ordinary doth not resign *nomine procuratorio*, as proctors do; but only presents the resignation of the person already made. Gibf. 822. Deg. p. 1. c. 14. Watsf. c. 4.

4. A collateral condition may not be annexed to the resignation; no more than an ordinary may admit upon condition, or a judgment be confessed upon condition, which are judicial acts. Watsf. c. 4.

For the words of resignation have always been, *pure, sponte, absolute et simpliciter*; to exclude all indirect bargains, not only for money, but for other considerations. And therefore in Gayton's case, E. 24 Eliz. where the resignation was, to the use of two persons therein named, and further limited with this condition, that if one of the two was not admitted to the benefice resigned, within six months, the resignation should be void and of none effect; such resignation, by reason of the condition, was declared to be absolutely void. God. 277. Gibf. 821. 1 Still. 334.

But where the resignation is made for the sake of exchange only, there it admits of this condition, viz. if the exchange shall take full effect, and not otherwise; as appears by the form of resignation which is in the register. Gibf. 821.

Resignation.

By a constitution of Othobon: *Whereas sometimes a man resigneth his benefices, that he may obtain a vacant see; and bargaineth with the collator, that if he be not elected to the bishoprick, he shall have his benefices again; we do decree, that they shall not be restored to him, but shall be conferred upon others as lawfully void. And if they be restored to him, the same shall be of no effect; and he who shall so restore them, after they have been resigned into his hands, or shall institute the resigner into them again, if he is a bishop he shall be suspended from the use of his dalmatic and pontificals, and if he is an inferior prelate he shall be suspended from his office, until he shall think fit to revoke the same.* Athon 134.

Must be accepted by the proper ordinary,

5. No resignation can be valid, till accepted by the proper ordinary: That is, no person appointed to a cure of souls, can quit that cure, or discharge himself of it, but upon good motives, to be approved by the superior who committed it to him; for it may be, he would quit it for money, or to live idly, or the like. And this is the law temporal, as well as spiritual; as appears by that plain resolution which hath been given, that all presentations made to benefices resigned, before such acceptance, are void. And there is no pretence to say, that the ordinary is obliged to accept; since the law hath appointed no known remedy, if he will not accept, any more than if he will not ordain. *Gibf. 822. 1 Still. 334.*

Lindwood makes a distinction in this case, between a cure of souls, and a sine-cure. The resignation of a sine-cure, he thinks, is good immediately, without the superior's consent; because none but he that resigneth hath interest in that case: but where there is a cure of souls it is otherwise, because not he only hath interest, but others also unto whom he is bound to preach the word of god; wherefore in this case it is necessary, that there be the ratification of the bishop, or of such other person as hath power by right or custom to admit such resignation. *Gibf. 823.*

Thus in the case of the marchioness of *Rockingham* and *Griffith*, Mar. 22. 1755. Dr Griffith being possessed of the two rectories of *Leythley* and *Thurnsco*, in order that he might be capacitated to accept another living which became vacant, to wit, the rectory of *Handsworth*, executed an instrument of resignation of the rectory of *Leythley* aforesaid, before a notary publick, which was tendred to and left with the archbishop of *York*, the ordinary of the place within which *Leythley* is situate. It was objected, that here doth not appear to have been any acceptance of the resignation by the archbishop, and that without his acceptance the said rectory of *Leythley* could not become void. And it was held by the lord chancellor clearly, that the ordinary's acceptance of the resignation is absolutely necessary to make an avoidance: But whether in this case there was a proper resignation and acceptance thereof, he reserved for further consideration; and in the mean time recommended it to the archbishop to produce the resignation in court. — Afterwards, on the 17th of April 1755, the cause came on again to be heard, and the resignation was then produced; but the counsel for the executors of the late marquis declaring that they did not intend to make any further opposition, the lord chancellor gave no opinion upon the resignation, or the effect of it; but

but in the course of the former argument, he held, that the acceptance of a resignation by the ordinary is necessary to make it effectual, and that it is in the power of the ordinary to accept or refuse a resignation.

And in the case of *Hesket and Grey*, H. 28 G. 2. where a general bond of resignation was put in suit, and the defendant pleaded that he offered to resign but the ordinary would not accept the resignation; the court of king's bench were unanimously of opinion, that the ordinary is a judicial officer, and is intrusted with a judicial power to accept or refuse a resignation as he thinks proper: And judgment was given for the plaintiff.

6. After acceptance of the resignation, lapse shall not run but from the time of notice given: It is true, the church is void immediately upon acceptance, and the patron may present if he please; but as to lapse, the general rule that is here laid down, is the unanimous doctrine of all the books. Inasmuch that if the bishop who accepted the resignation, dies before notice given, the six months shall not commence till notice is given, by the guardian of the spiritualties, or by the succeeding bishop; with whom the act of resignation is presumed to remain. *Gibf. 823.*

From what time lapse after resignation shall incur.

7. By the 31 El. c. 6. s. 8. *If any incumbent of any benefice with cure of souls, shall corruptly resign the same; or corruptly take for or in respect of the resigning the same, directly or indirectly, any pension, sum of money, or other benefit whatsoever: as well the giver, as the taker, of any such pension, sum of money, or other benefit corruptly, shall lose double the value of the sum so given taken or had; half to the queen, and half to him that shall sue for the same in any of her majesty's courts of record.*

Corrupt resignation.

Any pension] Before this statute, the bishop in cases of resignation might and did frequently, assign a pension during life, out of the benefice resigned, to the person resigning. *Gibf. 822.*

And by the statute of the 26 H. 8. c. 3. intituled, *an act for the payment of first fruits and tenths*, it was enacted, that incumbents charged with pensions payable to their predecessors during their lives, should deduct the tenth part thereof out of such payment, inasmuch as they were charged by the said act to pay the tenths of their whole living unto the king.

And by the same act it was provided, that no pension thereafter should be assigned by the ordinary, or by any other manner of agreement by collateral security or otherwise, upon any resignation of any dignity, benefice, or promotion spiritual, above the value of the third part of the dignity benefice or promotion spiritual resigned.

But now by the aforesaid act, no pensions whatsoever can be reserved.

Respond.

Respond.

RESPOND, was a short anthem sung, after reading three or four verses of a chapter; after which, the chapter did proceed. *Gibf. 263.*

Restoration of king Charles the second. See *Holidays.*

Review (Commission of). See *Appeal.*

Rochet.

ROCHET (a part of the episcopal habit), is a linen garment gathered at the wrists; and differeth from a surplice, in that a surplice hath open sleeves hanging down, but a rochet hath close sleeves. *Lindw. 251.*

It was also one of the sacerdotal vestments; and in that respect differed from a surplice in that it had *no* sleeves. *Lindw. 252.*

Rogation days. See *Holidays.*

Right of patronage. See *Advowson.*

Rural dean. See *Deans.*

Sabbath. See *Lord's day.*

Sacraments.

ART. 25. There are two sacraments ordained of Christ our lord in the gospel, that is to say, baptism and the supper of the lord.

Those five commonly called sacraments, that is to say, confirmation, penance, orders, matrimony, and extreme unction, are not to be counted for sacraments of the gospel; being such as have grown partly of the corrupt following of the apostles, partly are states of life allowed by the scriptures; but yet have not like nature of sacraments with baptism and the lord's supper, for that they have not any visible sign or ceremony ordained of god.

For

Sacraments.

319

For the sacrament of baptism, See the title **Baptism**.

For the sacrament of the Lord's supper, See the title **Lord's Supper**.

Sacrilege. See **Church**.

Sanctuary. See **Church**.

Schools.

THE determinations in the courts of law, relative to this title, do not seem to be delivered with that precision which is usual in other cases. And indeed, excepting in an instance or two in the court of chancery (as will appear), the general law concerning schools doth not seem to have been considered as yet upon full and solemn argument. And therefore liberty of animadversion is taken in some of the following particulars, which would not be allowable in matters finally adjudged and settled.

1. By the 7 & 8 *W. c.* 37. Whereas it would be a great hindrance to learning and other good and charitable works, if persons well inclined may not be permitted to found schools for the encouragement of learning, or to augment the revenues of schools already founded; it shall be lawful for the king to grant licences to aliene, and to purchase and hold in mortmain. Power of foundation.

But by the 9 *G. 2. c.* 36. After Jun. 24. 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, nor any sum of money, goods, chattels, stocks in the publick funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands tenements or hereditaments, shall be given or any ways conveyed or settled (unless it be bona fide for full and valuable consideration), to or upon any person or persons, bodies politick or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered, in trust or for the benefit of any charitable uses whatsoever; unless such appointment of lands, or of money or other personal estate (other than stocks in the publick funds,) be made by deed indented, sealed, and delivered in the presence of two witnesses, twelve kalendar months at least before the death of the donor, and be inrolled in chancery within six kalendar months next after the execution thereof; and unless such stock in the publick funds be transferred in the publick books usually kept for the transfer of stocks, six kalendar months at least before the death of the donor: and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without power of revocation. And any assurance otherwise made shall be void.

2. By

Licence.

2. By *Can. 77*. No man shall teach either in publick school or private house, but such as shall be allowed by the bishop of the diocese, or ordinary of the place, under his hand and seal; being found meet, as well for his learning and dexterity in teaching, as for sober and honest conversation, and also for right understanding of god's true religion; and also except he first subscribe simply to the first and third articles in the 36th canon, concerning the king's supremacy and the 39 articles of religion, and to the two first clauses of the second article, concerning the book of common prayer, viz. that it containeth nothing contrary to the word of god, and may lawfully be used.

And in the case of *Cory and Pepper*, *T. 30 Car. 2.* a consultation was granted in the court of king's bench, against one who taught without licence in contempt of the canons; and (the reporter says) the reason given by the court was, that the canons of 1603 are good by the statute of the 25 *Hen. 8.* so long as they do not impugn the common law, or the prerogative royal. 2 *Lev. 222.* *Gibf. 955.*

But this is unchronological and absurd: and as the office of a school-master is a lay office (for where it is supplied by a clergyman, that is only accidental, and not of any necessity at all;) it is clear enough, that the canon by its own strength in this case is not obligatory.

Therefore we must seek out some other foundation of the ecclesiastical jurisdiction: and there are many quotations for this purpose fetched out of the antient canon law (*Gibf. 1099.*); which altho' perhaps not perfectly decisive, yet it must be owned they bear that way.

The argument in *Cox's* case, seemeth to contain the substance of what hath been alledged on both sides in this matter; and concludeth in favour of the ecclesiastical jurisdiction. Which was thus: *M. 1700.* In the chancery; *Cox* was libelled against in the spiritual court at Exeter, for teaching school without licence from the bishop: And on motion before the lord chancellor, an order was made, that cause should be shewn why a prohibition should not go, and that in the mean time all things should stay. On shewing cause, it was moved to discharge the said order, alledging, that before the reformation this was certainly of ecclesiastical jurisdiction; and in proof thereof, was cited the 11th canon of the council of Lateran held in the year 1215, which canon hath been received by custom in this kingdom, and so made part of our ecclesiastical laws; that the statute of the 1 *Eliz. c. 1.* having restored the spiritual jurisdiction to the crown, which had been usurped by the pope, immediately thereupon the queen set forth ecclesiastical injunctions, one of which was, that no man should teach school without being allowed thereto by the ordinary; that it must be admitted, these injunctions were not confirmed by any act of parliament, but their being referred to and mentioned in the 5 *Eliz. c. 1.* was an argument that the legislature did approve of them; that in the 12th year of that queen, the said injunctions (and amongst them, this of teaching school without licence from the ordinary) were, by the convocation then sitting, turned into canons; that afterwards the statute of the 23 *Eliz. c. 1.* was the first statute that prohibited it; since which, two others had followed; but none of them tended to destroy the ecclesiastical jurisdiction,

jurisdiction, only, by making the offence punishable in both courts, gave a remedy where there was none before; that in the first year of king James, the convocation met, which reduced all the canons into one body, and then particularly made this canon, that none should teach school without licence from the ordinary; and tho' it might be difficult to prove, that these canons were directly confirmed by act of parliament, yet there was a sort of confirmation of them in the statute of the 4 *Ja. c. 7.* for the founding and incorporating a free grammar school at North-Leech in the county of Gloucester, whereby the provost and scholars of queen's college in Oxford were to nominate the schoolmaster and usher of the said school, and to make such ordinances for the government thereof as they should see meet, so that the same were not repugnant to the king's prerogative, to the laws and statutes of the realm, or to any *ecclesiastical canons or constitutions of the church of England.* But on the other side, it was answered, that there could not be one canon or precedent before the reformation, cited to prove the keeping of school to be of ecclesiastical cognizance; for that supposing the council of Lateran to have been in every part thereof received in England, yet the canon cited did not prove the point for which it had been produced, that canon only appointing schoolmasters in every cathedral church, and such schoolmasters to be licensed by the bishop; which was but reasonable, namely, that he who taught in the bishop's church, should be approved of by the bishop; that the teaching of school was not in the nature thereof spiritual; and it would be hard to affirm, that it was of ecclesiastical jurisdiction, or cognisable by the old ecclesiastical laws of the kingdom received by common use, at the same time that not one single precedent of any such law or usage before the reformation was to be found; and that as to the canons made since, they did not bind a layman (as Cox was suggested to be) because the laity was not represented in convocation; neither could a reference to the canons in a private act of parliament add any greater weight to them than they had before; that this was a case which deserved great consideration, having before been in the other courts of Westminster-hall, where several prohibitions had been granted on this very same point, in order that it might receive a judicial determination, but the other side would never venture to go on; as in Oldfield's case, *M. 9 W.* the case of Betsham and Barnardiston, *E. 10 W.* Chedwick's case, *M. 10 W.* Scoriet's case, *T. 11 W.* and one Davison's case, *T. 12 W.* that supposing it to have been originally a spiritual crime, yet being now made temporal by several acts of parliament, it was thereby drawn from the spiritual to the temporal jurisdiction. By Wright lord keeper: Both courts may have a concurrent jurisdiction; and a crime may be punishable both in the one and in the other: The canons of a convocation do not bind the laity without an act of parliament: But I always was, and still am of opinion, that keeping of school is by the old laws of England of ecclesiastical cognizance: And therefore let the order for a prohibition be discharged. Whereupon it was moved, that this libel was for teaching school generally, without shewing what kind of school; and the court christian could not have jurisdiction of writing schools, reading schools,

Schools.

schools, dancing schools, or such like. To which the lord keeper assented, and thereupon granted a prohibition as to the teaching of all schools, except grammar schools, which he thought to be of ecclesiastical cognizance. 1 *P. Will.* 29.

By act of parliament the case stands thus:

By the 23 *Eliz. c. 1.* *If any person or persons, body politick or corporate, shall keep or maintain any schoolmaster which shall not repair to some church chapel or usual place of common prayer, or be allowed by the bishop or ordinary of the diocese where such schoolmaster shall be so kept; he shall, upon conviction in the courts at Westminster, or at the assizes, or quarter sessions of the peace, forfeit for every month so keeping him 10l; one third to the king, one third to the poor, and one third to him that shall sue: and such schoolmaster or teacher, presuming to teach contrary to this act, and being thereof lawfully convicted, shall be disabled to be a teacher of youth, and suffer imprisonment without bail or mainprize for one year.*

The following case seemeth to have happened upon this statute; which in the adjudication, by some oversight, hath not been attended to: viz. *E. 13 W. K. and Douse.* The defendant was indicted for having kept a school without licence of the bishop of the diocese, against the form of the statute. Upon which it was moved to quash the indictment (being removed into the king's bench by certiorari), and the exceptions taken to the indictment were, 1. That there was no statute that prohibited keeping school without licence, but the 1 *Ja. c. 4. s. 9.* and the said act prescribed another method of proceeding. 2. This indictment was found before the justices of the peace at the quarter sessions; and they have no power by the act, and therefore it was void. 3. This school was not within the act of the 1 *Ja.* because the act extends but to grammar schools; and this school was for writing and reading. And afterwards, after a rule made to shew cause, the indictment was quashed. *L. Raym.* 672.

Further; By the 1 *Ja. c. 4. s. 9.* *No person shall keep any school, or be a schoolmaster, out of any of the universities or colleges of this realm, except it be in some publick or free grammar school, or in some such nobleman's or gentleman's house as are not recusants, or where the same schoolmaster shall be specially licensed thereunto by the archbishop bishop or guardian of the spiritualties of that diocese; upon pain, that as well the schoolmaster, as also the party that shall retain or maintain any such schoolmaster, shall forfeit each of them for every day so wittingly offending 40s; half to the king, and half to him that shall sue.*

And by the 13 & 14 *C. 2. c. 4.* *Every schoolmaster keeping any publick or private school, and every person instructing or teaching any youth in any house or private family as a tutor or schoolmaster, shall before his admission subscribe the declaration following, viz. "I A. B. do declare, that I will conform to the liturgy of the church of England, as it is now by law established." Which shall be subscribed before the archbishop, bishop, or ordinary of the diocese; on pain that every person so failing in such subscription, shall forfeit his school, and be utterly disabled and ipso facto deprived of the same, and the said school shall be void as if such person so failing were naturally dead.*

And

And if any schoolmaster, or other person, instructing or teaching youth in any private house or family as tutor or schoolmaster, shall instruct or teach any youth as a tutor or schoolmaster, before licence obtained from the archbishop, bishop, or ordinary of the diocese, according to the laws and statutes of this realm, (for which he shall pay 12d only,) and before such subscription as aforesaid; he shall for the first offence suffer three months imprisonment without bail; and for every second, and other such offence, shall suffer three months imprisonment without bail, and also forfeit to the king the sum of 5l. s. 8, 9, 10, 11.

M. 9 G. 2. The king against the bishop of Litchfield and Coventry. A mandamus issued to the bishop, to grant a licence to *Rushworth* a clergyman, who was nominated usher of a free grammar school within his diocese. To which he returned, that a caveat had been entred by some of the principal inhabitants of the place, with articles annexed, accusing him of drunkenness, incontineny, and neglect of preaching and reading prayers; and that the caveat being warned, he was proceeding to inquire into the truth of these things when the mandamus came; and therefore he had suspended the licensing him. And without entring much into the arguments, whether the bishop hath the power of licensing; the court held, that the return should be allowed as a temporary excuse: for tho' the act of the 13 & 14 C. 2. c. 4. obligeth them only to assent to and subscribe the declaration, yet it adds, *according to the laws and statutes of this realm*; which presupposeth some necessary qualifications, which it is reasonable should be examined into. Str. 1023.

By the several stamp acts, the licence to schoolmasters and tutors shall be on a double 5th stamp.

After licence obtained; the schoolmaster must take the oaths, and exhibit a certificate of his having received the sacrament, at the quarter sessions, as other persons qualifying for offices.

And by *Can. 137*. Every schoolmaster shall, at the bishop's first visitation, or at the next visitation after his admission, exhibit his licence, to be by the said bishop either allowed, or (if there be just cause) disallowed and rejected.

3. By the 11 & 12 W. c. 4. If any papist, or person making profession Papists. of the popish religion, shall keep school, or take upon himself the education or government or boarding of youth; he shall be adjudged to perpetual imprisonment, in such place within this kingdom, as the king by advice of his privy council shall appoint. s. 3.

4. By the 17 C. 2. c. 2. It shall not be lawful for any person who shall Dissenters. take upon him to teach or preach in any meeting or conventicle under pretence of any exercise of religion, or for any other person who shall not first take and subscribe the oath following, and who shall not frequent divine service established by the laws of this kingdom, ——— to teach any publick or private school, or take any boarders or tablers that are taught and instructed by himself or any other; on pain of 40l, one third to the king, one third to the poor, and one third to him that shall sue in the courts at Westminster or at the assizes or quarter sessions. Which oath is as followeth: "I A. B. do swear, that it is not lawful upon any pretence
T t 2 " what-

“ whatsoever, to take arms against the king; and that I do abhor that
 “ traiterous position of taking arms by his authority against his person,
 “ or against those that are commissioned by him in pursuance of such com-
 “ missions; and that I will not at any time endeavour any alteration of
 “ government either in church or state.”

But by the 1 *W. c.* 18. commonly called the act of toleration; nei-
 ther the said act, nor the before recited act of the 23 *Eliz. c.* 1. nor any
 other made against papists or popish recusants (except as therein ex-
 cepted), shall extend to protestant dissenters qualified according to
 that act.

Under which general words [*nor any other made against papists or popish
 recusants*] the aforesaid statute of the 1 *Ja. c.* 4. seemeth also to be inclu-
 ded. But the above recited clause of the statute of the 13 & 14 *C. 2. c.* 4.
 seemeth to stand clear of this branch. But then there is a further clause
 in the said act of toleration, by which it is enacted, that no protestant
 dissenter, qualified as therein directed, *shall be prosecuted in any ecclesiastical
 court, for or by reason of their non-conforming to the church of England.*
 From which, their exemption from ecclesiastical censures for teaching
 school without licence is pleaded, and in practice seemeth to be allowed;
 altho' there doth not appear to have been any legal determination therein.
 But it doth not seem, by any words of this statute, that they are ex-
 empted from the temporal penalties above recited of the 13 & 14 *C. 2.*
c. 4. s. 8, 9, 10, 11.

Whether the
 ordinary may
 proceed to de-
 privation, for
 teaching with-
 out licence.

5. In *Bales's* case, *M. 21 C. 2.* it was held, that where the patronage
 is not in the ordinary, but in feoffees or other patrons; the ordinary can-
 not put a man out: and a prohibition was granted; the suggestion for
 which was, that he came in by election, and that it was his freehold.
2 Keb. 544.

Upon which Dr Gibson justly observes, that if this be any bar to his
 being deprived by ordinary authority; the presentation to a benefice by a
 lay patron, and the parson's freehold in that benefice, would be as good
 a plea against the deprivation of the parson by the like authority. And
 yet this plea hath been always rejected by the temporal courts. And in
 one circumstance at least, the being deprived of a school, notwithstanding
 the notion of a freehold, is more naturally supposed, than deprivation of
 a benefice; because the licence to a school is only during pleasure, whereas
 the institution to a benefice is absolute and unlimited. *Gibf. 1110.*

In what case
 curates shall
 have the pre-
 ference in
 teaching
 school.

6. By *Can. 78.* In what parish church or chapel soever there is a cu-
 rate, which is a master of arts, or bachelor of arts, or is otherwise well
 able to teach youth, and will willingly so do, for the better increase of his
 living, and training up of children in principles of true religion; we will
 and ordain, that a licence to teach youth of the parish where he serveth,
 be granted to none by the ordinary of that place, but only to the said
 curate: Provided always, that this constitution shall not extend to any
 parish or chapel in country towns, where there is a publick school founded
 already; in which case, we think it not meet to allow any to teach gram-
 mar, but only him that is allowed for the said publick school.

7. By

7. By Can. 79. *All schoolmasters shall teach in english or latin, as the Order to be children are able to bear, the larger or shorter catechism, heretofore by publick observed authority set forth. And as often as any sermon shall be upon holy and fes- therein. tival days, within the parish where they teach, they shall bring their scholars to the church where such sermon shall be made, and there see them quietly and soberly behave themselves, and shall examine them at times convenient after their return, what they have born away of such sermons. Upon other days, and at other times, they shall train them up with such sentences of holy scriptures, as shall be most expedient to induce them to all godliness. And they shall teach the grammar set forth by king Henry the eighth, and continued in the times of king Edward the sixth and queen Elizabeth of noble memory, and none other. And if any schoolmaster, being licensed, and having subscribed as is aforesaid, shall offend in any of the premisses, or either speak write or teach against any thing whereunto he hath formerly subscribed, if upon admonition by the ordinary he do not amend and reform himself, let him be suspended from teaching school any longer.*

The larger or shorter catechism] The larger is that in the book of common prayer: The shorter was a catechism set forth by king Edward the sixth, which he by his letters patents commanded to be taught in all schools; which was examined, reviewed, and corrected in the convocation of 1562, and published with those improvements in 1570, to be a guide to the younger clergy in the study of divinity, as containing the sum and substance of our reformed religion. *Gibb. 374.*

Shall bring their scholars to the church] *E. 10 & 11 W. Betcham and Barnardiston.* The chief question was, whether a schoolmaster might be prosecuted in the ecclesiastical court for not bringing his scholars to church, contrary to this canon. And it was the opinion of the court, that the schoolmaster, being a layman, was not bound by the canons. *1 P. Will. 32.*

Grammar] Compiled and set forth by William Lily and others specially appointed by his majesty; in the preface to which book it is declared, that "as for the diversity of grammars, it is well and profitably taken away by the king's majesty's wisdom; who foreseeing the inconvenience, and favourably providing the remedy, caused one kind of grammar by fundry learned men to be diligently drawn, and so to be set out only; every where to be taught for the use of learners, and for avoiding the hurt in changing of schoolmasters."

8. By the 43 *Eliz. c. 4.* Where lands rents annuities goods or money, Subject to a given for maintenance of free schools or schools of learning, have been commission of misapplied, and there are no special visitors or governors appointed by pious uses, the founder; the lord chancellor may award commissions under the great where there is seal, to inquire and take order therein. no visitor.

9. Whether a mandamus lieth for restoring a schoolmaster or usher, Whether the when in fact they have been deprived by the local visitors, is doubtfully visitor's power spoken of in the books of common law; and the pleadings upon them is conclusive; seem not to touch the present point, but to turn chiefly upon this, Whether

ther they are to be accounted offices of a publick or private nature. *Gibf.* 1110.

Thus in the case of the *king* against the bailiffs of *Morpeth*. A mandamus was granted, to restore a man to the office of under-schoolmaster of a grammar school at *Morpeth*, founded by king *Edward the sixth*: The same being of a publick nature, being derived from the crown. *Str.* 58.

And the distinction seemeth to be this: If they shall be deemed of a publick nature, as constituted for publick government; they shall be subject to the jurisdiction of the king's courts of common law: but if they be judged matters only of private charity, then they are subject to the rules and statutes which the founder ordains, and to the visitor whom he appoints, and to no other. *L. Raym.* 5.

In the case of colleges in the universities, whether founded by the king or by any other, it seemeth now to be settled, that they are to be considered as private establishments, subject only to the founder, and to the visitor whom he appointeth: and it doth not seem easy to discern any difference between schools and colleges in this respect.

Governors eo
nomine are
not visitors.

10. *H.* 1725. *Eden* and *Foster*. The free grammar school of *Birmingham* was founded by king *Edward the sixth*, who endowed the said school, and by his letters patent appointed perpetual governors thereof, who were thereby enabled to make laws and ordinances for the better government of the said school, but by the letters patent no express visitor was appointed, and the legal estate of the endowment was vested in these governors. After a commission had issued under the great seal to inspect the management of the governors, and all the exceptions being already heard and over-ruled, it was now objected to this commission, that the king having appointed governors, had by implication made them visitors likewise; the consequence of which was, that the crown could not issue a commission to visit or inspect the conduct of these governors. The matter first came on before lord chancellor *Macclesfield*, and afterwards before lord *King*, who desired the assistance of lord chief justice *Eyre*, and lord chief baron *Gilbert*; and accordingly the opinion of the court was now delivered seriatim, that the commission was good. 1. It was laid down as a rule, that where the king is founder, in that case his majesty and his successors are visitors; but where a private person is founder, there such private person and his heirs are by implication of law visitors. 2. That tho' this visitatorial power did result to the founder and his heirs, yet the founder might vest or substitute such visitatorial right in any other person or his heirs. 3. They conceived it to be unreasonable, that where governors are appointed, these by construction of law and without any more should be visitors; should have an absolute power, and remain exempt from being visited themselves. And therefore, 4. That in those cases where the governors or visitors are said not to be accountable, it must be intended, where such governors have the power of government only, and not where they have the legal estate and are intrusted with the receipt of the rents and profits (as in the present case); for it would be of the most pernicious consequence, that any persons intrusted with the receipt

ceipt of rents and profits, and especially for a charity, tho' they misemploy never so much these rents and profits, should yet not be accountable for their receipts: this would be such a privilege, as might of it self be a temptation to a breach of trust. 5. That the word governor did not of it self imply visitor; and to make such a construction of a word, against the common and natural meaning of it, and when such a strained construction could not be for the benefit, but rather to the great prejudice of the charity, would be very unreasonable; besides, it would be making the king's charter operate to a double intent, which ought not to be. And the commission under the great seal was resolved to be well issued.

2 P. Will. 325.

11. The following case relateth particularly to a church; but is equally applicable to, and far more frequently happeneth in the case of schools. It is that of *Waltham* church, H. 1716. Edward Denny, earl of Norwich, being seised by grant from king Edward the sixth, of the site and demesnes of the dissolved monastery of Waltham Holy Cross, and of the manor of Waltham, and of the patronage of the church of Waltham, and of the right of nominating a minister to officiate in the said church, it being a donative, the abbey being of royal foundation, by his will in 1636, amongst other things the said earl devised a house in Waltham, and a rent charge of 100l a year, and ten loads of wood to be annually taken out of the forest of Waltham, and his right of nominating a minister to officiate in the said church, to six trustees and their heirs, of which Sir Robert Atkins was one, in trust for the perpetual maintenance of the minister, to be from time to time nominated by the trustees; and directed that when the trustees were reduced to the number of three, they should chuse others. It so fell out, that all the trustees, except Sir Robert Atkins, were dead; and he alone took upon him to enfeof others to fill up the number; and now the surviving trustees (of the said Sir Robert's appointment) did nominate Laphorn to officiate; and the lady Floyer and Campion, who were owners of the dissolved monastery and of the manor, claimed the right of nomination to the donative, and had nominated Cowper to officiate there, and he was got into possession. The bill was, that Laphorn might be admitted to officiate there, and to be quieted in the possession, and to have an account of the profits. By the defendants it was amongst other things insisted, that the trustees having neglected to convey over to others, when they were reduced to the number of three, and the legal estate coming only to one single trustee, he had not power to elect others; but by that means the right of nomination resulted back to the grantor, and belonged to the defendants, who had the estate, and stood in his place; or at least the court ought to appoint such trustees as should be thought proper. By Cowper, lord chancellor; It is only directory to the trustees, that when reduced to three, they should fill up the number of trustees; and therefore altho' they neglected so to do, that would not extinguish or determine their right; and Sir Robert Atkins, the only surviving trustee, had a better right than any one else could pretend to, and might well convey over to other trustees; it was but what he ought to have done: and it was decreed for the plaintiff with costs,

Taxes.

costs, and an account of profits; but the master to allow a reasonable salary to Cowper, whilst he officiated there. 2 *Vern.* 749.

12. By the 43 *Eliz. c. 2.* All lands within the parish are to be assessed to the *poor* rate.

But by the annual acts for the *land tax*, it is provided, that the same shall not extend to charge any masters or ushers of any schools, for or in respect of any stipend, wages, rents, or profits, arising or growing due to them, in respect of their said places or employments.

Provided, that nothing herein shall extend to discharge any tenant of any the houses or lands belonging to the said schools, who by their leases or other contracts are obliged to pay all rates, taxes, and impositions whatsoever; but that they shall be rated and pay all such rates, taxes, and impositions.

And in general, it is provided, that all such lands revenues or rents, settled to any charitable or pious use, as were assessed in the 4th year of *Will. & Mar.* shall be liable to be charged; and that no other lands, tenements or hereditaments, revenues, or rents whatsoever, then settled to any charitable or pious uses, as aforesaid, shall be charged.

And the reason of this distinction seemeth to be, because in that year, the sums to be charged were fixed and determined upon every particular division; lands which were then appropriated to charities being exempted out of the valuation: therefore it is no hardship upon the neighbourhood, that lands then exempted shall be exempted still, for the other lands pay no more upon the account of such exemption: but if lands appropriated to charities since that time should by such appropriation become exempted, this would lay a greater burden upon all the rest, because the same individual sum upon the whole division is to be raised still.

Seats in churches. See Church.

Sees of bishops. See Cathedrals.

Select vestry. See Vestry, in the title Church.

Sentence.

A Sentence is either *definitive*, or *interlocutory*:

A *definitive* sentence is that, which puts an end to the suit in controversy, and regards the principal matter in question:

An *interlocutory* sentence determines only some incident or emergent matter in the proceeding, as some exception, or the like; but doth not affect the principal matter in controversy. *Ayl. Par.* 487.

By the ancient canon law, sentence of suspension, or excommunication, ought not to be given without a previous admonition; unless the offence is

is such as in its own nature immediately requires such sentence. In archbishop Arundel's register, mention is made of an appeal from a sentence of suspension, as unjust, for want of a canonical admonition. *Gibf.* 1046.

And every sentence must be in writing; otherwise it deserves not the name of a sentence, and needeth not the formality of an appeal to reverse it. *Id.* 1047.

And by the several stamp acts, every sentence or final decree must be on a double fixpeny stamp.

And the sentence must be pronounced in the presence of both parties; otherwise, sentence given in the absence of one of the parties is void. *Id.*

Sentences upon the church wall. See Church.

Separatists. See Dissenters.

Sequestration.

1. **W**HEN a living becomes void by the death of an incumbent, or otherwise; the ordinary is to send out his sequestration, to have the cure supplied, and to preserve the profits (after the expences deducted) for the use of the successor. *God. Append.* 14.

2. Sometimes a benefice is kept under sequestration for many years together, or wholly; namely, when it is of so small value, that no clergyman fit to serve the cure will be at the charge of taking it by institution: In which case, the sequestration is committed sometimes to the curate only, sometimes to the curate and churchwardens jointly. *Johnf.* 121.

3. Sometimes the fruits and profits of a living which is in controversy, either by the consent of parties, or the judge's authority, are sequestered and placed for safety, in a third hand. And thus where two different titles are set on foot, the rights are carefully preserved, and given to him for whom the cause is adjudged. *God. Append.* 14.

And the judge is also wont to appoint some minister to serve the cure, for the time that the controversy shall depend; and to command those to whom the sequestration is committed, to allow such salary as he shall assign out of the profits of the church to the parson that he orders to attend the cure. *Watf. c.* 30.

4. Sometimes for neglect of serving the cure, the profits of the living are to be sequestered. *id.* 15.

5. Sometimes upon the king's writ to the bishop, to satisfy the debts of the incumbent. *id.*

And this is, where a judgment hath been obtained against a clergyman, and upon a *fiery facias* directed to the sheriff to levy the debt and damages,

Sequestration.

damages, he returns, that the defendant is a clerk beneficed having no lay fee. Whereupon a *levari facias* is directed to the bishop to levy the same of his ecclesiastical goods, and by virtue thereof the tithes shall be sequestred.

And in this case, the bishop may name the sequestrators himself, or may grant the sequestration to such persons as shall be named by the party who obtained the writ.

If the sequestration be laid and executed before the day of the return of the writ; the mean profits may be taken by virtue of the sequestration after the writ is made returnable, otherwise not.

Dilapidations. 6. Sometimes when the houses and chancels that the incumbent is bound to repair, are ruined and ready to fall if after due admonition they shall delay to begin to amend the same within two months; then the bishop of the diocese, that time being elapsed, shall sequester the fruits and tithes till those defects are amended: and tho' the admonition proceed from the archdeacon, yet the bishop only hath the power of sequestration. *God. Apend. 14.*

Appeal. 7. *Stratford.* If an appeal be made against a sentence of sequestration, and lawfully prosecuted; the party sequestred shall enjoy the profits, pending the appeal.

Sequestrators duty. 8. It is usual for the ecclesiastical judge, to take bond of the sequestrators, well and truly to gather and receive the tithes fruits and other profits, and to render a just account. *Watf. c. 30.*

And those to whom the sequestration is committed, are to cause the same to be published in the respective churches, in the time of divine service. *id.*

It is best and most legal for the sequestrators, to receive the tithes and dues in kind.

But the sequestrators cannot maintain an action for tithes in their own name, at the common law, nor in any of the king's temporal courts; but only in the spiritual court, or before the justices of the peace where they have power by law to take cognizance. *Johns. 122.*

Thus in the case of *Berwick and Swanton, T. 1692.* It was resolved in the court of exchequer, that a sequestrator cannot bring a bill alone for tithes; because he is but as a bailiff, and accountable to the bishop, and hath no interest. *Bunb. 192.*

After the sequestrators have performed the duty required, the sequestration is to be taken off, and application of the profits to be made according to the direction of the ordinary. And he shall allow to them a reasonable sum out of the profits, according to the trouble they shall have had in gathering the tithes. And he is also to allow for the supply of the cure, what shall be convenient, relation being had to the charge, and to the profits; and likewise for the maintenance of the incumbent and of his family (in case where there is an incumbent), if he hath not otherwise sufficient to maintain them.

If the sequestrators refuse to deliver up their charge, they shall be compelled thereunto by the ecclesiastical judge; and if they shall, being called thereunto, delay to give an account, it is usual for the judge to deliver
unto

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unto the party grieved the bond given, with a warrant of attorney to sue for the penalty thereof to his own use at the common law. *Wats. c. 30.*

Therefore, if the incumbent is not satisfied with what the sequestrators have done in the execution of their charge, his proper remedy is by application to the spiritual judge; and if he shall think himself aggrieved by the determination of such judge, he may appeal to a superior jurisdiction. Sometimes a bill in equity hath been brought; which yet, as it seemeth, ought not to be brought against the sequestrators solely, for that they are only bailiffs or receivers, and have no interest: As in the case of *Jones and Barret, H. 1724.* On a bill by the vicar of West Dean in the county of Sussex against the defendant, who was sequestrator, for an account of the profits received during the vacation; it was objected for the defendant, that the bishop ought to have been made a party, since the sequestrator is accountable to him for what he receives; and the court seemed to think the bishop should have been a party; but by consent the cause was referred to the bishop of the diocese. *Burb. 192.*

Sermons. See Publick worship.

Sexton.

THE sexton, *segsten*, *segerstane*, (*sacrista*, the keeper of the holy things belonging to the divine worship) seemeth to be the same with the *ostiarius* in the Romish church; and is appointed by the minister or others, and receiveth his salary, according to the custom of each parish.

It hath been adjudged, that a mandamus lies to restore a sexton; tho' as to this the court at first doubted, because he was rather a servant to the parish than an officer, or one that had a freehold in his place: But upon a certificate shewn from the minister, and divers of the parish, that the custom was to chuse a sexton, and that he held it for his life, and that he had 2d a year of every house within the parish; they granted a mandamus, directed to the churchwardens to restore him. *3 Bac. Abr. 530.*

T. 12 G. Olive and Ingram. In assumpsit for money had and received to the plaintiff's use, a case was made at nisi prius for the opinion of the court; that there being a vacancy in the office of sexton of the parish of St Botolph without Aldersgate in the city of London, the plaintiff and Sarah Bly were candidates; and Sarah Bly had 169 indisputable votes, and 40 which were given by women, who were housekeepers and paid to the church and poor; that the plaintiff had 174 indisputable votes, and 22 other votes given by such women as aforesaid; that Sarah Bly was declared duly elected: upon which the plaintiff brought a mandamus, and was sworn in, and the defendant had received 5s belonging to the office.

U u 2.

In

Sexton.

In this case two points were made: 1. Whether a woman was capable of being chosen sexton. And, 2. Whether women could vote in the election. As to the first, the court seemed to have no difficulty about it; there having been many cases where offices of greater consequence have been held by women, and there being many women sextons at that time in London: in the second year of queen Anne, a woman was appointed governor of Chelmsford workhouse: lady Broughton was keeper of the Gatehouse: lady Packington was the returning officer for members at Ailbury. As to the second point, it was shewn, that women cannot vote for members of parliament or coroners, and yet they have freeholds, and contribute to all publick charges; and tho' they vote in the monied companies, yet that is by virtue of the acts which give the right to all persons possessed of so much stock; that military tenures never descended to them. But the court notwithstanding held, that this being an office that did not concern the publick, or the care and inspection of the morals of the parishioners; there was no reason to exclude women, who paid rates, from the privilege of voting: they observed, here was no usage of excluding them stated, which perhaps might have altered the case; and that as this case was stated, the plaintiff did not appear to have been duly elected; and therefore there ought to be judgment against him. *Str.* 1114.

M. 5 *G.* *K.* and the churchwardens of *Thame* in Oxfordshire. They who have power to appoint a sexton, have power to displace him at pleasure. *Str.* 115.

Sick.

- I. *Visitation of the sick.*
- II. *Communion of the sick.*
- III. *Departing out of this life.*

I. *Visitation of the sick.*

BY *Can.* 76. When any person is dangerously sick in any parish: the minister or curate, having knowledge thereof, shall resort unto him or her (if the disease be, not known or probably suspected to be infectious), to instruct and comfort them in their distress, according to the order of the communion book if he be no preacher, or if he be a preacher then as he shall think most needful and convenient.

And by the *Rubrick* before the office for the visitation of the sick: When any person is sick, notice shall be given thereof to the minister of the parish; who shall go to the sick person's house, and use the office there appointed.

And

And the minister shall examine the sick person, whether he repent him truly of his sins, and be in charity with all the world; exhorting him to forgive, from the bottom of his heart, all persons that have offended him; and if he hath offended any other, to ask them forgiveness; and where he hath done injury or wrong to any man, that he make amends to the uttermost of his power. And if he hath not before disposed of his goods, let him then be admonished to make his will, and to declare his debts, what he oweth, and what is owing to him for the better discharge of his conscience, and the quietness of his executors. But men should often be put in remembrance to take order for the settling of their temporal estates, whilst they are in health.

And the minister should not omit earnestly to move such sick persons as are of ability, to be liberal to the poor.

II. *Communion of the sick.*

By a constitution of archbishop *Pecckam*; The sacrament of the eucharist shall be carried with due reverence to the sick, the priest having on at least a surplice and stole, with a light carried before him in a lantern with a bell; that the people may be excited to due reverence; who by the minister's discretion shall be taught to prostrate themselves, or at least to make humble adoration, wheresoever the king of glory shall happen to be carried under the cover of bread.

But by the rubrick of the 2 *Ed.* 6. it was ordered, that there shall be no elevation of the host, or shewing the sacrament to the people.

By the present rubrick before the office for the communion of the sick, it is ordered as follows: Forasmuch as all mortal men be subject to many sudden perils, diseases, and sicknesses and ever uncertain what time they shall depart out of this life; therefore to the intent they may be always in a readiness to die whensoever it shall please almighty god to call them, curates shall diligent from time to time (but especially in the time of pestilence or other infectious sickness) exhort their parishioners to the often receiving of the holy communion of the body and blood of our saviour Christ, when it shall be publickly administered in the church; that so doing, they may in case of sudden visitation, have the less cause to be disquieted for lack of the same. But if the sick person be not able to come to the church, and yet is desirous to receive the communion in his house; then he must give timely notice to the curate, signifying also how many there are to communicate with him (which shall be three, or two at the least); and having a convenient place in the sick man's house, with all things necessary so prepared that the curate may reverently minister, he shall there celebrate the holy communion.

But if a man, either by reason of extremity of sickness, or for want of warning in due time to the curate, or for lack of company to receive with him, or by any other just impediment, do not receive the sacrament of Christ's body and blood; the curate shall instruct him, that if he do truly repent him of his sins, and stedfastly believe that Jesus Christ hath suffered death upon the cross for him, and shed his blood for his redemption;

Sick.

tion; earnestly remembring the benefits he hath thereby, and giving him hearty thanks therefore; he doth eat and drink the body and blood of our saviour Christ profitably to his soul's health, altho' he do not receive the sacrament with his mouth.

In the time of the plague, sweat, or other such like contagious times of sickness or diseases, when none of the parish can be gotten to communicate with the sick in their houses, for fear of the infection; upon special request of the diseased, the minister may only communicate with him.

III. Departing out of this life.

Can. 67. When any is passing out of this life, a bell shall be tolled, and the minister shall not then slack to do his last duty. And after the party's death (if it so fall out), there shall be rung no more but one short peal, and one other before the burial, and one other after the burial.

And this tolling of the bell seemeth to have been originally founded on the doctrine of masses satisfactory, or prayers for the dead; that every person, upon hearing of the bell, should apply himself to prayer for the soul of the person departing, or departed, out of this life.

And the alms usually given at funerals, seemeth to have been intended for the like purpose.

Sidesmen. See Churchwardens.

Simony.

SIMONY hath its name from *Simon Magus*, who thought to have purchased the gift of the holy ghost for money. *3 Inst. 153.*

Simoniacus is he who maketh a corrupt contract; and *simoniace promotus* is he who is promoted upon such contract, altho' he was not privy to it himself.

I. *Simony by the canon law.*

II. *By statute.*

I. *Simony by the canon law.*

1. *Langton.* We strictly forbid any man to resign his church, and then accept the vicarage of the same church from his own substitute; because in this case some unlawful bargain may be well suspected. And if any shall presume to do contrary hereunto, the one shall be deprived of his vicarage, and the other of his parsonage. *Lind. 107.*

It may seem strange, that any one should chuse to be vicar rather than rector; but as there might in some particular cases be other reasons for it, so there was one very apparent reason, viz. that the Lateran council under Innocent the third, had forbidden the holding two churches, that is, two rectories, but not two vicarages, or a rectory and a vicarage. For tho' the Lateran canon against pluralities was not yet put in execution here; yet the clergy were apprehensive that this would soon be done. *Johns. Langt.*

2. Wethershead. *It shall not be lawful to any man, to transfer a church to another in the name of a portion, or take any money or covenanted gain for the presentation of any one: And if any shall be found guilty hereof, by conviction, or confession; we do decree, by the king's authority and by our own, that he shall for ever be deprived of the patronage of that church.* Lind. 281.

In the name of a portion] That is, as a portion from a father or grandfather, to his son or grandson. *Johns. Wether.*

We do decree by the king's authority] Lindwood says, that de facto the king of England hath cognizance in causes of the right of patronage; which this constitution takes notice of as such: altho', he says, the contrary is true by the canon law. Lind. 281.

Shall for ever be deprived of the patronage] Which seemeth to be intended, during his life; and not to extend to his heirs after him, so as to punish them for their father's or other ancestor's crime. Lind. 281.

And Sir Simon Degge observes upon this, that a canon is not sufficient to deprive a man of his freehold or inheritance: and this canon (he says) was never put in execution, or attempted so to be, so far as he can find. Deg. p. 1. c. 5.

3. Othobon. *Whereas we understand that it frequently happeneth, that when a presentation is to be made to a vacant church, he who is to be presented first maketh a bargain with the patron for a certain sum to be paid to him yearly out of the profits of the church, and he who hath made such contract is presented to the church; we, intending to provide against this act of simony and detriment to the church, do utterly revoke all pensions heretofore imposed on parish churches, unless they who have or receive the same, are warranted from the the beginning by lawful prescription, or special privilege, or other certain right.* Athon 135.

Neither was this canon (saith Sir Simon Degge) of better effect than the other, as to the making contracts void, which were only determinable at the common law, where this canon could not be pleaded in bar. Deg. p. 1. c. 5.

But there were some general canons (he says) of the church of greater force; whereby a person simoniacally promoted is punished by deprivation, and a simoniack by deprivation and perpetual disability, not only as to the church

church he was presented to upon a simoniacal contract, but also as to all others. *Deg. p. 1. c. 5.*

4. Simony is the more odious (lord Coke says) because it is ever accompanied with perjury; for the presentee is sworn to commit no simony. *3 Inst. 156.*

Thus by a canon of archbishop Langton, it is ordained as followeth: *We do decree, that the bishop shall take an oath of him who shall be presented, that for such presentation he neither promised nor gave any thing to the person presenting him, nor made any agreement with him for the same; especially if he who is presented be probably suspected of the same.* *Lind. 108.*

Bishop] Or other ordinary who hath power to grant institution. *Lind. 108.*

He neither promised] By word or other stipulation. *Lind. 108.*

Nor gave] Either by exchange, or recompence, or confirmation of what had been given before, or by bequest, or remission. *Lind. 109.*

To the person presenting him] And if he promise any thing to another, altho' it be not to him who hath the presentation; yet if it be so that he shall not otherwise have the benefice, this also is simony. *Lind. 109.*

And by Can. 40. *To avoid the detestable sin of simony, because buying and selling of spiritual and ecclesiastical functions, offices, promotions, dignities, and livings is execrable before god; therefore the archbishop and all and every bishop or bishops or any other person or persons having authority admit, institute, collate, instal, or to confirm the election of any archbishop bishop or other person or persons, to any spiritual or ecclesiastical function dignity promotion title office jurisdiction place or benefice with cure or without cure, or to any ecclesiastical living whatsoever, shall before every such admission institution collation installation or confirmation of election respectively minister to every person hereafter to be admitted instituted collated installed or confirmed in or to any archbishoprick bishoprick or other spiritual or ecclesiastical function dignity promotion title office jurisdiction place or benefice with cure or without cure, or in or to any ecclesiastical living whatsoever, this oath in manner and form following, the same to be taken by every one whom it concerneth, in his own person, and not by a proctor: "I N. N. do swear, that I have made no " simoniacal payment contract or promise, directly or indirectly, by my " self, or by any other to my knowledge or with my consent, to any " person or persons whatsoever, for or concerning the procuring and " obtaining of this ecclesiastical dignity, place, preferment, office, or " living" [respectively and particularly naming the same, whereunto he is to be admitted, instituted, collated, installed, or confirmed] " nor will at any " time hereafter perform or satisfy any such kind of payment contract or " promise made by any other without my knowledge or consent: So help " me god thro' Jesus Christ."*

And this oath, whether interpreted by the plain tenor of it, or according to the language of former oaths, or the notions of the catholic

tholick church concerning simony, is against *all* promises whatsoever. *Gibf.* 802.

Therefore tho' a person comes not within the statute of the 31 *El.* hereafter following, by promising *money, reward, gift, profit, or benefit*; yet he becomes guilty of perjury, if he takes this oath, after any promise of what kind soever. *Id.*

Dr Watson queries, whether the oath against simony be not abolished with the oath *ex officio*: But Mr. Johnson says, he may as well query the oaths of allegiance and supremacy; for that a clerk is no more obliged to accuse or purge himself of simony by the one, than of rebellion or popery by the other. *Watf. c. 15. Johnf. 73.*

Which latter opinion is agreeable to the general practice and allowance, especially as the makers of the statute which repealeth the oath *ex officio*, do not seem to have had any thought or intention of touching upon this oath against simony; albeit the reason here alledged may of it self perhaps not be sufficient, for the oaths of allegiance and supremacy are enjoined by statutes subsequent to that which abolisheth the oath *ex officio*.

Which statute abolishing the oath *ex officio*, is as followeth; viz. *It shall not be lawful for any archbishop, bishop, vicar general, chancellor, commissary, or any other spiritual or ecclesiastical judge, officer, or minister, or any other person, having or exercising spiritual or ecclesiastical jurisdiction, to tender or administer unto any person whatsoever, the oath usually called the oath ex officio, or any other oath whereby such person to whom the same is tendred or administered, may be charged or compelled to confess, or accuse, or to purge him or her self of any criminal matter or thing, whereby he or she may be liable to censure or punishment: any thing in this statute, or any other law, custom, or usage heretofore to the contrary in any wise notwithstanding.* 13 C. 2. c. 12. s. 4.

In the case of *K. and Lewis, M. 4 G.* an information was moved for against a clergyman, for perjury at his admission to a living, upon an affidavit that the presentation was simoniacal. But the court refused to grant it, till he had been convicted of the simony. *Str.* 70.

II. By Statute.

1. By the 31 *Eliz. c. 6.* *For the avoiding of simony and corruption in presentations collations and donations of and to benefices dignities prebends and other livings and promotions ecclesiastical, and in admissions institutions and inductions to the same; s. 4.*

It is enacted, that if any person or persons, bodies politick and corporate, shall or do, for any sum of money reward gift profit or benefit directly or indirectly, or for or by reason of any promise agreement grant bond covenant or other assurance of or for any sum of money reward gift profit or benefit whatsoever directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration; every such presentation collation gift and bestowing, and every admission institution investiture

cure and induction thereupon, shall be utterly void, frustrate, and of none effect in law: And it shall be lawful for the queen, her heirs and successors, to present, collate unto, or give or bestow, every such benefice dignity prebend and living ecclesiastical, for that one time or turn only: And all and every person or persons, bodies politick and corporate, that shall give or take any such sum of money reward gift or benefit directly or indirectly, or that shall take or make any such promise grant bond covenant or other assurance, shall forfeit and lose the double value of one year's profit of every such benefice dignity prebend and living ecclesiastical: And the person so corruptly taking procuring seeking or accepting any such benefice dignity prebend or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice dignity prebend or living ecclesiastical. §. 5.

And if any person shall for any sum of money reward gift profit or commodity whatsoever directly or indirectly (other than for usual and lawful fees) or for or by reason of any promise agreement grant covenant bond or other assurance of or for any sum of money reward gift profit or benefit whatsoever directly or indirectly, admit institute instal induct invest or place any person in or to any benefice with cure of souls, dignity, prebend, or other ecclesiastical living; every such person so offending shall forfeit and lose the double value of one year's profit of every such benefice dignity prebend and living ecclesiastical; and thereupon immediately from and after the investing installation or induction thereof had, the same benefice dignity prebend and living ecclesiastical shall be estfoons merely void; and the patron or person to whom the advowson gift presentation or collation shall by law appertain, shall and may by virtue of this act present or collate unto give and dispose of the same benefice dignity prebend or living ecclesiastical, in such sort to all intents and purposes, as if the party so admitted instituted installed invested inducted or placed had been or were naturally dead. §. 6.

Provided, that no title to confer or present by lapse, shall accrue upon any voidance mentioned in this act, but after six months next after notice given of such voidance, by the ordinary to the patron. §. 7.

And if any incumbent of any benefice with cure of souls shall corruptly resign or exchange the same, or corruptly take for or in respect of the resigning or exchanging the same, directly or indirectly, any pension, sum of money, or benefit whatsoever; as well the giver as the taker of any such pension, sum of money, or other benefit corruptly, shall lose double the value of the sum so given taken or had: the one moiety as well thereof, as of the forfeiture of the double value of one year's profit before mentioned, to be to the queen, and the other to him that will sue for the same in any of her majesty's courts of record. §. 8.

Provided always, that this act or any thing therein contained, shall not in any wise extend to take away or restrain any punishment pain or penalty limited prescribed or inflicted by the laws ecclesiastical, for any the offences before in this act mentioned; but that the same shall remain in force, and may be put in due execution, as it might be before the making of this act; this act, or any thing therein contained, to the contrary thereof in any wise notwithstanding. §. 9.

And moreover, if any person shall receive or take any money fee reward or any other profit directly or indirectly, or shall take any promise agreement cove-

nant bond or other assurance to receive or have any money fee reward or any other profit directly or indirectly, either to himself or to any other of his friends (all ordinary and lawful fees only excepted), for or to procure the ordaining or making of any minister, or giving of any orders, or licence to preach; he shall for every such offence forfeit the sum of 40l: and the party so corruptly ordained or made minister, or taking orders, shall forfeit the sum of 10l: And if at any time within seven years next after such corrupt entring into the ministry or receiving of orders, he shall accept or take any benefice, living, or promotion ecclesiastical; then immediately from and after the induction investing or installation thereof or thereinto had, the same shall be estfoons merely void; and the patron shall present, collate unto, give and dispose of the same, as if the party so inducted invested or installed had been naturally dead: the one moiety of all which forfeitures shall be to the queen, and the other to him that will sue in nay of her majesty's courts of record. s. 10.

S. 4. *For the avoiding of simony*] Almost all the authors who have treated of this subject, and even the learned judges in delivering their resolutions in cases of simony, have asserted that there is no word of *simony* in this act; and from thence a conclusion hath been drawn in favour of the ecclesiastical jurisdiction, that the temporal courts have nothing to do with simony as such, or to define what shall be deemed simony and what not, but only to take cognizance of the particular corrupt contracts therein specified. Which consequence, altho' deducible perhaps from other premisses, yet doth not follow from the aforesaid observation; for it is plain here is the word *simony*: and the mistake seemeth to have happened from this short preamble being inadvertently printed at the end of the foregoing section, treating intirely of a different subject; so as to have been overlooked by the first person who made the observation, whom others perhaps have followed without examination.

Donations] For the like reason only (as it seemeth), a doubt was made in the case of *Bawderock* and *Mackaller*, *M. 9 Car.* whether this statute extendeth to donatives. *Cro. Car.* 330.

S. 5. *If any person or persons*] If one who hath no right, present by usurpation, and doth it by reason of any corrupt contract or agreement; that presentation and the induction thereupon are hereby void: for this statute extends to all patrons, as well by wrong as by right. In like manner, if when a church is void, the void turn is purchased; altho' the grant of a void turn, as being a thing in action, is of it self void, and the purchaser's presentee comes in *quasi per usurpationem*: yet because it is by means of a simoniacal contract, it is as much simony, as if the grant had not been void. 1 *Inst.* 120. 3 *Inst.* 153. *Cro. Eliz.* 789.

And it is to be observed, that this clause is general, "If any person or persons", and doth make no allowance in the case of father and son, more than in the case of other persons; and that therefore the notion that a purchase of the next avoidance when the incumbent is sick and ready to die, and the son's privity to that purchase, is less simony in the case of a son, than it would be in the case of any other person, hath no foundation in the act. Neither is the reason that a father is bound by nature to provide for

Simony.

his son, good to the aforesaid purpose; for a man is bound by nature also to provide for himself, and so might as well purchase for himself. *Watf. c. 5. Gibf. 798.*

So if a father, in consideration of a clerk's marrying his daughter, doth covenant with the clerk's father, that he will procure the clerk to be presented, admitted, instituted, and inducted into such a church upon the next avoidance thereof; this is a simoniacal contract. *Watf. c. 5.*

Directly or indirectly] Simony may be committed, and yet neither the patron nor incumbent privy to it, or knowing of it. Thus in a writ of error to reverse a judgment, whereby the king had recovered in a quare impedit upon a title of simony, which was, that a friend of the patron agreed to give so much money to one (who was not the patron), to procure the said parson to be presented, who was presented according to that agreement; it was assigned for error, that it did not appear, that either patron or parson were knowing of this agreement. But by the court; the parson is simoniacally promoted: and a case was mentioned, where the parson of St Clements was ousted, by reason that a friend had given money to a page belonging to the earl of Exeter, to endeavour to procure the presentation, and neither the earl nor the parson knew any thing of it. *Watf. c. 5.*

Bond covenant or other assurance, of or for any sum of money, reward, gift, profit or benefit whatsoever] The bond and assurance here mentioned, being for money, reward, gift, profit or benefit, a way was found very early to defeat the intention of this act, by *general bonds of resignation*, whereby the presentee obliged himself to resign and void the benefice, within a certain time after warning to be given to him, or else indefinitely, whenever the patron should require it. *Gibf. 799, 800.*

And these bonds have been allowed both in law and equity: Thus in the case of *Peele* and the *earl of Carlisle*, *M. 6 G.* In the king's bench: In an action of debt upon a bond, conditioned to resign a benefice; the court refused to let the defendant's counsel argue the validity of such bonds, they having been so often established even in a court of equity; and that also, where the condition is general, and not barely to resign to a particular person. *Str. 227.*

So, *M. 9 G.* In the chancery. *Peele* and *Capel*. *Capel* on presenting *Peele* to a living, took a bond from him to resign when the patron's nephew came of age, for whom the living was designed. When the nephew was of age, instead of requiring a resignation, it was agreed between them all, that *Peele* should continue to hold the living, paying 30*l* a year to the nephew. *Peele* makes the payment for seven years, but refusing to pay any more, the patron puts the bond in suit. And then *Peele* comes into this court for an injunction, and to have back his 30*l* a year. On hearing, the lord chancellor granted the injunction, not (as he said) upon account of any defect in the bond it self, which he held good, but on account of the ill use that had been made of it: and as to the money, it being paid upon a simoniacal contract, he left the plaintiff to go to law for it. *Str. 534.*

So, in the case of *Durston and Sandys*, M. 1686. The defendant upon his presenting the plaintiff to a parsonage, took a bond of him to resign; which (as the reporter says) tho' in it self lawful, yet the patron making an ill use of it, viz. to prevent the incumbent from demanding tithes in kind, the court awarded a perpetual injunction against the bond. 1 Vern. 411.

And in the case of *Hesket and Grey*, in the king's bench, H. 28 G. 2. (which was a case out of chancery): — Debt upon a bond. Upon oyer of the condition, it appeared that the obligor had been presented to the living of Staining by the obligee, and had agreed to deliver it up into the hands of the ordinary, within three months after the expiration of five years, at the request of the plaintiff his heirs or assigns, or upon proper notice in writing, so that a new presentation might be made. And after this recital of the agreement, the condition was, that if the defendant did deliver up into the hands of the ordinary the said living, so as that the same might become void, then the obligation to be void. The defendant pleaded, that he did offer to resign absolutely the living, and that he delivered the resignation to the ordinary that he might accept the same and the plaintiff make a new presentation, but that the ordinary refused to accept it. He pleaded further, that the agreement was corrupt; and that the bond was taken to keep the defendant in awe, and therefore also corrupt and void. Ryder chief justice delivered the resolution of the court: The averring in the plea, that the agreement was corrupt, will not make it so; but it should be set forth what sort of corruption, that the court may judge whether simoniacal or not. As to the point, whether a general bond of resignation is good; we are all of opinion it is. It was determined in the case of lord *Carlisle* and *Peele*. But every simoniacal contract is void, where it is secured only by promise. Otherwise it is, when a bond is given for the performance of such a contract, when the condition does not express the agreement, but is only a condition for payment of money, because we cannot go out of the written condition to vacate the obligation, and also because a specialty does not want a consideration to support it, as a promise depending only upon simple contract does. It has been objected, that these kind of bonds, when the contract appears upon the face of the condition to be for a general resignation upon request, are void: Indeed it does look so; but the law is otherwise. And as to the other objection, we are all of opinion that the plea in bar is bad, because it is not averred that the bishop has accepted this resignation, and for these reasons: 1. Because without the acceptance of the ordinary, the resignation is not compleat, and the patron can have no benefit of such a resignation. 2. Because the defendant has undertaken for the acceptance of the bishop, as that is necessary to make a compleat resignation, which he has by the condition of his bond agreed to do. 3. Because the plea does not contain a sufficient excuse for the bishop's non-acceptance of the resignation; for the defendant has undertaken that the bishop shall do it, or if he does not he will make a satisfaction by paying money or the like to the party who is injured thereby; and this is reasonable, and is the law in such cases, when the obligor undertakes for the act.

act of a stranger. The ordinary is a judicial officer, and is intrusted with a judicial power to accept or refuse resignations as he thinks proper. And judgment was given for the plaintiff.—But it appearing that the patron had advertised the living to be sold, and, in treating with a purchaser for it, that he had declared he asked and expected a greater price for it, as he could compel an immediate resignation: lord Hardwicke, for this reason, and as it was making a bad use of the bond, granted an injunction to restrain the patron from proceeding further upon the bond.

In order to prevent the evil consequences of this kind of traffick, Dr Gibson takes occasion to wish, that the ordinaries would do these two things: first, that they would refuse to ordain any persons but upon good and sufficient titles, which would lessen the number of those who are ready to submit to such bonds; and in the next place, that they would refuse to admit or accept any resignations (without which the incumbent cannot void the benefice in that way), but after the strictest enquiry, and the fullest satisfaction, concerning the motives and reasons upon which they are made. *Gibf. 800.*

And Sir Simon Degge wisheth (which indeed would more effectually cure the evil) that an act of parliament might be made, to declare all such bonds to be void. *Deg. p. 1. c. 5.*

Shall be utterly void, frustrate, and of none effect in law] Before this act, they were only voidable by deprivation; but hereby they are made void without any deprivation, or sentence declaratory in the ecclesiastical court: as was adjudged in the case of *Hickcock and Hickcock*. So as the parishioners may deny their tithes, and alledge in the spiritual court that he came in by simony. But Hutton said, there was no remedy for the tithes, which a simoniacal incumbent had actually received. *1 Inst. 120. Gibf. 800, 1.*

But here is to be observed a diversity, between a presentation or collation made by a rightful patron, and an usurper. For in case of the rightful patron, which doth corruptly present or collate, by the express letter of this act the king shall present; but where one doth usurp, and corruptly present or collate, there the king shall not present, but the rightful patron: for the branch that gives the king power to present, is only intended where the rightful patron is in fault; but where he is in no fault, there the corrupt act and wrong of the usurper shall not prejudice his title. *3 Inst. 153.*

And it shall be lawful for the queen to present for that one time or turn only] In this particular, the penalty of simony which was by the canon law, with regard to the patron, is somewhat mitigated: the canons which had been made both at home and abroad (when they speak of this loss of patronage) making it perpetual. But because patronage in England is accounted a temporal matter, and corrupt patrons were not to be reached by the ecclesiastical laws (which could only touch the incumbent); therefore, for the more effectual discouragement of simony, by affecting the patron also, this statute was made. *Gibf. 801.*

And

And every person that shall take or make any such promise] So that the penalty (as it seemeth) is incurred by such promise; tho' the patron should afterwards present the clerk gratis. *Gibf. 801.*

Shall forfeit and lose the double value of one year's profit] And this double value shall be accounted, according to the true value as the same may be letten, and shall be tried by a jury; and not according to the valuation in the king's books. *3 Inst. 154.*

And the person so corruptly taking, procuring, seeking, or accepting] It was said by Tanfield chief baron, in *Calvert* and *Kitchyn's* case, that if a clerk *seeketh* to obtain a presentation by money, altho' afterwards the patron present him gratis; yet this simoniacal attempt hath disabled him to take that benefice. *Gibf. 801.*

Be adjudged a disabled person in law, to have or enjoy the same benefice] Many of the ancient canons of the church, make *deposition* the punishment of simony, whether in bishops or presbyters; others make it *deprivation*. But the civil and canon law observe a difference in point of penalty, between a person guilty of simony, and a person simoniacally promoted. If the clerk himself is privy or party to the simony, he is to be deprived of that, and for ever disabled to accept any other; but if he is only simoniacally promoted, by simony between two other persons, whereunto he was not privy, he is deprivable by reason of the corruption, but not disabled to take any other. In like manner, according to this statute, if the presentee was not privy to the simony, tho' the church is become void by the simony, yet he is not disabled from being presented again; for a man cannot be said to be *corruptly taking*, who is not privy to the corrupt agreement. But a presentee, who was privy to the simony, is a person disabled to enjoy the same benefice during life, nor can the king or any other dispense with the disability. *Gibf. 801. 2 Haw. 396. 12 Co. 101.*

S. 6. *Admit, institute, install, induct]* The reason of this clause, lord Coke tells us, (for, he says, he was of that parliament, and observed the proceedings therein) was, to avoid hasty and precipitate admissions and institutions, to the prejudice of them that had right to present, by putting them to a quare impedit; and it is presumed, that no such haste or precipitation is used, but for a corrupt end and purpose. *3 Inst. 155.*

Immediately after the investing, installation, or induction] Albeit the church is full by institution, against all but the king: yet the church becometh not void by this branch of the act, until after induction. *3 Inst. 155.*

S. 9. *Shall not in any wise extend to take away or restrain any punishment pain or penalty, limited prescribed or inflicted by the laws ecclesiastical]* So far are the ancient ecclesiastical laws against simony, and the power of the spiritual court in the execution of those laws, from being superseded by this act; that hereby they are expressly confirmed. And all promises and contracts, of what kind soever, being forbidden, and by consequence punishable,

punishable, by the laws ecclesiastical; it follows, that it could not be the intention of the legislators, to make this statute the rule and measure of simony; but only to check and restrain it in the most notorious instances. *Gibf. 801.*

Which consideration seemeth fully to warrant bishop Stillingfleet's observation, that this statute doth not abrogate the ecclesiastical laws as to simony, but only enacteth some particular penalties on some more remarkable simoniacal acts, as to benefices and orders; but doth not go about to repeal any ecclesiastical laws about simony, or to determine the nature and bounds of it: And also the observation of archbishop Wake; that this act is not privative of the jurisdiction of the church, or its constitutions, but accumulative; that it leaveth to the church all the authority which it had before; only, whereas before these crimes were inquirable and punishable by the ecclesiastical judge alone, they may now, in some cases specified in this statute, be brought before the civil magistrate also. *Gibf. 798.*

And therefore still the ecclesiastical court may proceed against a simonist pro salute animæ, and upon examination and evidence deprive him for that cause: and this, altho' he was not privy to the contract; for there are no accessaries in simony. And when the spiritual court hath so sentenced the simony, the temporal court ought to give credence thereto, and ought not to dispute whether it be error or not. For the temporal court cannot take cognizance of their proceedings herein, whether they be lawful or not; which is the reason that in the temporal court it sufficeth to plead a sentence out of the spiritual court briefly, without shewing the manner thereof, and of their proceedings. And tho' it hath been said, that in the spiritual court they ought not to intermeddle to devert the freehold, which is in the incumbent after induction; it is true indeed, they cannot alter the freehold, but they by their proceeding meddle only with the manner of obtaining the presentment, which by consequence only deverteth the freehold from the simonist by the dissolution of his estate, when his admission and institution are voided; and therefore may proceed: or rather, the church being made void by act of parliament, he who pretends to be incumbent thereof hath no freehold therein; so, depriving of him, cannot be said to devert any freehold from him. However, it is best, that not any of the articles to be examined upon in this case, be such as may expressly draw the right and title of the benefice into question; lest occasion be taken from thence to bring a prohibition. *Watf. c. 5.*

2. By the 1 W. c. 16. *Whereas it hath often happened, that persons simoniack or simoniacally promoted to benefices or ecclesiastical livings, have enjoyed the benefit of such livings many years, and sometimes all their life time, by reason of the secret carriage of such simoniacal dealing; and after the death of such simoniack person, another person innocent of such crime, and worthy of such preferment, being presented or promoted by another patron innocent also of that simoniacal contract, have been troubled and removed upon pretence of lapse or otherwise to the prejudice of the innocent patron in reversion,*
and

and of his clerk, whereby the guilty goeth away with the profit of his crime, and the innocent succeeding patron and his clerk are punished, contrary to all reason and good conscience: for prevention thereof it is enacted, that after the death of the person so simoniacally promoted, the offence or contract of simony shall neither by way of title in pleading, or in evidence to a jury, or otherwise, be alledged or pleaded to the prejudice of any other patron innocent of simony, or of his clerk by him presented or promoted, upon pretence of lapse to the crown or to the metropolitan or otherwise; unless the person simoniack or simoniacally promoted, or his patron, was convicted of such offence at the common law or in some ecclesiastical court, in the life time of the person simoniack or simoniacally promoted or presented. s. 1, 2.

And no lease really and bona fide made by any person simoniack or simoniacally promoted to any deanry prebend or parsonage or other ecclesiastical benefice or dignity, for good and valuable consideration, to any tenant or person not being privy to or having notice of such simony, shall be impeached or avoided for or by reason of such simony, but shall be good and effectual in law, the said simony notwithstanding. s. 3.

3. By the 12 An. st. 2. c. 12. Whereas some of the clergy have procured preferments for themselves, by buying ecclesiastical livings, and others have been thereby discouraged; it is enacted, that if any person shall for any sum of money reward gift profit or advantage directly or indirectly, or for or by reason of any promise agreement grant bond covenant or other assurance of or for any sum of money reward gift profit or benefit whatsoever directly or indirectly, in his own name or in the name of any other person, take procure or accept the next avoidance of or presentation to any benefice with cure of souls dignity prebend or living ecclesiastical, and shall be presented or collated thereupon; every such presentation or collation, and every admission institution investiture and induction upon the same, shall be utterly void frustrate and of no effect in law, and such agreement shall be deemed a simoniacal contract; and it shall be lawful for the queen, her heirs and successors, to present or collate unto, or give or bestow every such benefice dignity prebend and living ecclesiastical, for that one time or turn only; and the person so corruptly taking procuring or accepting any such benefice dignity prebend or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have and enjoy the same, and shall also be subject to any punishment pain or penalty limited prescribed or inflicted by the laws ecclesiastical, in like manner as if such corrupt agreement had been made, after such benefice dignity prebend or living ecclesiastical had become vacant; any law or statute to the contrary in any wise notwithstanding.

Which statute having been understood as only prohibiting clergymen from purchasing livings for themselves; the intention thereof (if that was its sole intention) may be easily frustrated, by employing others to purchase for them.

4. By the 20 G. 2. c. 52. All offences of simony, and all proceedings and sentences thereupon, are excepted out of the general pardon granted by that act.

Simony.

The form of a general bond of resignation hath been thus :

K NOW all men by these presents, that we A. B. of ——— in the county of ——— clerk, and C. D. of ——— in the county of ——— gentleman, are held and firmly bound to E. F. of ——— in the county of ——— esquire, in the sum of ——— of good and lawful money of Great Britain, to be paid to the said E. F. or to his certain attorney, his executors administrators or assigns : For the true payment whereof, we bind our selves and each of us, jointly and severally, and each and every of our joint and several heirs executors and administrators, firmly by these presents. Sealed with our seals, and dated this ——— day of ——— in the ——— year of the reign of our sovereign lord George the third of Great Britain, France, and Ireland, king, defender of the faith, and so forth, and in the year of our lord one thousand seven hundred and sixty three.

WHEREAS the abovenamed E. F. is seised of or intitled to the advowson, nomination, right of patronage and presentation of the vicarage [or, rectory] of the parish church of G. in the county of ——— and diocese of ——— which is now become vacant ; and whereas the said E. F. hath presented, nominated, and appointed the abovebound A. B. to supply the said vacancy, and to be vicar of the said vicarage and parish church of G. in order for him the said A. B. to be instituted and inducted thereto by the proper ordinary ; and whereas the said A. B. hath agreed to resign and deliver up the said vicarage and parish church of G. into the hands of the proper ordinary, upon the request of the said E. F. his heirs executors administrators or assigns, or upon notice in writing given to him or left for him for that purpose at the vicarage house of the said vicarage by the said E. F. his heirs executors administrators or assigns, so that thereby the said vicarage and parish church may become vacant, and the said E. F. his heirs executors administrators or assigns, patrons of the said church, may present anew : Now the condition of the abovementioned obligation is such, that if the abovebound A. B. do and shall upon the request of the said E. F. his heirs executors administrators or assigns, or upon notice in writing given to him the said A. B. or left for him for that purpose at the vicarage house of the said vicarage by the said E. F. his heirs executors administrators or assigns, absolutely resign and deliver up the said vicarage and parish church of G. aforesaid, with its appurtenances, into the hands of the proper ordinary or guardian of the spiritualties for the time being absolutely to accept of such resignation of the said vicarage and parish church of G. whereby the said vicarage and parish church of G. may become vacant, and the said E. F. his heirs executors administrators or assigns, patrons of the said church, may present anew to the said vicarage and parish church, discharged of all charges and incumbrances done or suffered by the said A. B. and also, if the said A. B. do not or shall not commit or suffer, or cause to be committed, any waste or dilapidations, upon the houses, lands, tenements, or hereditaments belonging to the said vicarage, during the time he shall be so vicar of the said vicarage and parish church ; Then this obligation to be void, otherwise to be and remain in full force and virtue.

Signed, sealed, and delivered (the paper having been first duly stamped) in the presence of us

H. I.

K. L.

A. B.

C. D.

Sine

Sine-cure.

1. **T**HE original of sine-cures was thus: The rector (with proper Original of consent) had a power to intitle a vicar in his church, to officiate fine cures. under him; and this was often done: and by this means, two persons were instituted to the same church, and both to the cure of souls, and both did actually officiate. So that however the rectors of sine-cures, by having been long excused from residence, are in common opinion discharged from the cure of souls (which is the reason of the name); and however the cure is said in the law books to be in them *habitualiter* only; yet in strictness, and with regard to their original institution, the cure is in them *actualiter*, as much as it is in the vicar. *Gibf.* 719. *Johnf.* 85.

That is to say, where they come in by institution; but if the rectory is a donative, the case is otherwise: for there, coming in by donation, they have not the cure of souls committed to them. And these are most properly sine-cures, according to the genuine signification of the word. *Johnf.* 85.

2. But no church, where there is but one incumbent, is properly a No sine cure fine-cure. If indeed the church be down, or the parish become destitute where there is of parishioners without which divine offices cannot be performed; the incumbent is of necessity acquitted from all publick duty: but still he is but one incumbent. under an obligation of doing this duty, whenever there shall be a competent number of inhabitants, and the church shall be rebuilt. And these benefices are more properly depopulations than sine-cures. *Johnf.* 84.

3. Bishopricks, deanries, and archdeaconries, were of old generally Bishopricks, deanries, archdeaconries, prebends. said to have the cure of souls belonging to them; some have said the same of prebends, but with less reason. Bishops have the cure of their whole dioceses; and archdeacons do, in many particulars, share with them in their spiritual cures. The dean was said to have the cure of his canons, and of the rest belonging to the choir; who were all in old time to make their confessions to him, and receive absolutions from him; but it doth not appear, that the canons or prebendaries have or had the cure of souls, in this or any other respect. They are indeed for the most part instituted, but not to the cure of souls. *Johnf.* 86.

4. Possession of sine-cures (not being exempt as is aforesaid) must be Possession of fine-cures how obtained. obtained by the same methods by which the possession of other rectories and vicarages is obtained, namely; by presentation, institution, and induction. And the reason is, because the vicarage had not its beginning by appropriation and endowment (which was a discharge to the parson from the cure), but by *intitulation*, that is by being admitted to a title, or a share in the profits and cure of the rectory, together with the rector, and in subordination to him as vicar. For altho' by a constitution of archbishop Langton there might not be two rectors or parsons in one church; yet there might be, and sometimes were established in the same church both a rector and vicar, with cure of souls: and in such case, the rectory came to be a sine-cure, not because it was really so in law,

Sine-cure.

but because the rectors got themselves excused from residence, and by degrees devolved the whole spiritual cure upon the vicars. *Gibf.* 818.

Upon which ground, the possessors of sine-cures, are not bound to read the thirty nine articles by the 13 *El. c.* 12. And in this only, institution to sine-cures differs from institution to other benefices. *Johnf.* 86.

Not within
the statute of
pluralities.

5. Sine-cures are not within the statute of pluralities, such livings being not by the said statute deemed incompatible; but only those to which the cure of souls is actually, and not only habitually annexed. *Deg. p.* 1. c. 13.

Singing of psalms. See **Publick worship.**

Slander. See **Defamation.**

Sodomy. See **Wuggery.**

Son, succeeding his father in a benefice. See **Benefice.**

Spoliation.

SPOLIATION is a writ obtained by one of the parties in suit, suggesting that his adversary (*spoliavit*) hath wasted the fruits, or received the same, to the prejudice of him who sueth out the writ. *1 Ought.* 13.

And a cause of spoliation shall be tried in the spiritual court, and not in the temporal. And this suit lieth for one incumbent against another, where they both claim by one patron, and where the right of the patronage doth not come in question or debate. As if a parson be created a bishop, and hath a dispensation to keep his benefice, and afterwards the patron presents another incumbent, who is instituted and inducted; now the bishop may have against that incumbent a spoliation in the spiritual court, because they claim both by one patron, and the right of the patronage doth not come in debate, and because the other incumbent came to the possession of the benefice by the course of the spiritual law, that is to say, by institution and induction; so that he hath colour to have it, and to be parson by the spiritual law: for otherwise, if he be not instituted and inducted, spoliation lies not against him, but rather a writ of trespass, or an assise of novel disseisin. *Terms of the L.*

So it is also, where a parson who hath a plurality doth accept another benefice, by reason whereof the patron presents another clerk, who is instituted and inducted: Now the one of them may have a spoliation against the other, and then shall come in debate whether he hath a sufficient plurality or not. And so it is in case of deprivation. *T. L.*

The same law is, where one telleth the patron that his clerk is dead ; whereupon he presents another : there the first incumbent, who was supposed to be dead, may have a spoliation against the other. And so in divers other like cases. *T. L.*

If a patron do present a clerk unto an advowson, who is instituted and inducted, and afterwards another man doth present another clerk to the same advowson, who is also instituted and inducted ; there, one of them shall not have a spoliation against the other, if he disturb him of the church, or do take away the fruits thereof ; because the right of the patronage doth come in debate in the spiritual court which of the patrons hath a right to present. And therefore in that case, if one of them sue a spoliation against the other, he shall have a prohibition unto the spiritual court, and no consultation shall be granted for the cause aforesaid. *F. N. B.* 86.

When spoliation is brought to try which of two persons instituted is the rightful incumbent of a parsonage or vicarage, or after sentence given against one of the parties who hath appealed ; it is usual for the ecclesiastical judge, at the petition of either of the parties, to decree that the fruits of the church be sequestred, and to commit the power of collecting them to the churchwardens or some others of the same parish, first taking bond of such persons, whereby they shall be obliged to collect and keep the tithes for the use of him that shall be found to have the right, and to render a just account when called thereunto. And the judge is also wont to appoint some minister to serve the cure, for the time that the controversy shall depend ; and to command those to whom the sequestration is committed, to allow such salary as he shall assign out of the profits of the church, to the parson that he orders to attend the cure. And after the suit is determined, the sequestration is to be taken off, and the profits collected to be restored to him that prevails at law ; to wit, in specie, if they remain so ; or if not, the value of them. *Watf. c.* 30.

Stamps.

Stamp duties relating to the several matters treated of in this book, by the acts of 5 *W. c.* 21. 9 & 10 *W. c.* 25. 12 *An. st.* 2. *c.* 9. 30 *G. 2. c.* 19. and 32 *G. 2. c.* 35. seem to be as follows :

1. For every skin and piece of vellum or parchment, or sheet of paper, on which shall be written any grant or letters patent under the great seal, or any honour, dignity, promotion, franchise, liberty or privilege, or exemplifications of the same (except charity briefs) ; — dispensation to hold two livings, or any dispensation or faculty from the archbishop of Canterbury, or master of the faculties ; — admittance of a fellow of the college of physicians, or of any advocate, proctor, notary, or other officer

Stamps.

- in any ecclesiastical court;—appeal from the court of arches, or the prerogative courts;—shall be paid a stamp duty of 6*l* or treble 40*s*.
- Double 40*s*. 2. Presentation or donation under the great seal, collation, or any presentation or donation by any patron to any spiritual promotion of 10*l* a year in the king's books, — 4*l* or double 40*s*.
- Single 40*s*. 3. Letters patent for charity briefs;—register, entry, testimonial, certificate of a degree in the universities (except the register or entry of a bachelor of arts) — 40*s*.
- Treble 5*s*. 4. Institution, or licence, that shall pass the seal of any bishop, chancellor, or other ordinary, or any ecclesiastical court (except licences to schoolmasters and tutors) — 15*s*.
- Double 5*s*. 5. Exemplification that shall pass the seal of any court;—licence to schoolmasters and tutors;—probate of a will, or letters of administration for an estate above 20*l* value (except of common seamen or soldiers slain or dead in the service) — 10*s*.
- Single 5*s*. or double 2*s* 6*d*. 6. Licence for, or certificate of marriage (except the certificate of the marriage of a seaman's widow);—commission issuing out of any ecclesiastical court, not otherwise particularly charged;—5*s*.
- Single 2*s* 6*d*. 7. Bond, lease, contract, or other obligatory instrument, protest, procuration, or any other notarial act, 2*s* 6*d*.
- Double 1*s*. 8. Matriculation in the universities, 2*s*.
- Treble 6*d*. 9. Writ of dedimus potestatem out of chancery to appoint guardians, 1*s* 6*d*.
- Double 6*d*. 10. Affidavit, (except for burying in woollen); copy thereof to be read or filed in court; citation, monition, libel, allegation, deposition, answer, sentence or final decree, inventory, or any copies of them;—1*s*.
- Double 1*d*. 11. Copy of a will, 2*d*.

Stipendiary priests.

THE stipendiary priests were for trentals, anniversaries, obits, and such like; grounded on the doctrine of purgatory and masses satisfactory. And for these, chantries were founded and endowed, to pray for the souls of the founder and his friends: Which chantries were dissolved by the statute of the 1 *Ed.* 6. *c.* 14.

Striking in the church or churchyard. See Church.

Subdeacon.

Subdeacon.

SUBDEACON is one of the five inferior orders in the Romish church; whose office it is, to wait upon the deacon in the administration of the sacrament of the lord's supper. *Gibf.* 99.

Suffragan. See Bishops.

Suicide.

BY the rubrick before the burial office; persons who have laid violent hands upon themselves, shall not have that office used at their interment.

And the reason thereof given by the canon law is, because they die in the commission of a mortal sin (*Lind.* 164.); and therefore this extendeth not to idiots, lunatics, or persons otherwise of insane mind, as children under the age of discretion, or the like; so also not to those who do it involuntarily, as where a man kills himself by accident: for in such case it is not their crime, but their very great misfortune.

Sunday. See Lord's Day.

Superinstitition. See Benefice.

Supposititious births. See Bastards.

Supremacy.

LORD chief justice Hale says; The supremacy of the crown of King's supremacy by the common law, England in matters ecclesiastical is a most indubitable right of the crown, as appeareth by records of unquestionable truth and authority. *1 H. H.* 75.

Lord chief justice Coke saith; By the ancient laws of this realm, this kingdom of England is an absolute empire and monarchy, consisting of one head, which is the king; and of a body consisting of several members, which the law divideth into two parts, the clergy and laity, both of them next and immediately under god subject and obedient to the head. *5 Co.* 8. 40. *Caudrey's case.*

By the parliament of England in the 16 *R.* 2. *c.* 5. it is asserted, that the crown of England hath been so free at all times, that it hath been in no earthly subjection, but immediately subject to god in all things touching the regality of the same crown, and to none other.

Supremacy.

And in the 24 *H. 8. c. 12.* it is thus recited; By sundry and authentic histories and chronicles it is manifestly declared and expressed, that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having dignity and royal estate of the imperial crown of the same: unto whom a body politick, compact of all sorts and degrees of people, divided in terms and by names of spirituality and temporality, been bounden and owen to bear next unto god, a natural and humble obedience; he being also furnished by the goodness and sufferance of almighty god, with plenary whole and intire power, preeminence, authority, prerogative, and jurisdiction, to render and yield justice and final determination to all manner of persons resiants within this realm, in all causes matters debates and contentions, without restraint or provocation to any foreign princes or potentates of the world; in causes spiritual by judges of the spirituality, and causes temporal by temporal judges.

Again, 25 *H. 8. c. 21.* The realm of England, recognizing no superior under god, but only the king, hath been and is free from subjection to any man's laws, but only to such as have been devised made and obtained within this realm for the wealth of the same, or to such other as by sufferance of the king, the people of this realm have taken at their free liberty by their own consent to be used amongst them, and have bound themselves by long use and custom to the observance of the same, not as to the observance of the laws of any foreign prince potentate or prelate, but as to the custumed and ancient laws of this realm, originally established as laws of the same by the said sufferance contents and custom, and none otherwise.

By the canons
of the church.

2. *Can. 1.* As our duty to the king's most excellent majesty requireth, we first decree and ordain, that the archbishop from time to time, all bishops, deans, archdeacons, parsons, vicars, and all other ecclesiastical persons, shall faithfully keep and observe, and as much as in them lieth shall cause to be observed and kept of others, all and singular laws and statutes made for restoring to the crown of this kingdom, the ancient jurisdiction over the state ecclesiastical, and abolishing of all foreign power repugnant to the same. Furthermore, all ecclesiastical persons having cure of souls, and all other preachers, and readers of divinity lectures, shall to the uttermost of their wit knowledge and learning, purely and sincerely (without any colour of dissimulation) teach manifest open and declare, four times every year at the least, in their sermons and other collation and lectures, that all usurped and foreign power (forasmuch as the same hath no establishment nor ground by the law of god) is for most just causes taken away and abolished, and that therefore no manner of obedience or subjection within his majesty's realms and dominions is due unto any such foreign power; but that the king's power, within his realms of England Scotland and Ireland and all other his dominions and countries, is the highest power under god, to whom all men, as well inhabitants as born within the same, do by god's laws owe most loyalty and obedience, afore and above all other powers and potentates in the earth.

Can. 2. Whoever shall affirm, that the king's majesty hath not the same authority in causes ecclesiastical, that the godly kings had amongst the jews and christian emperors of the primitive church, or impeach any part of his regal supremacy in the said causes restored to the crown, and by the laws of this realm therein established; let him be excommunicated ipso facto, and not restored but only by the archbishop, after his repentance and publick revocation of those his wicked errors.

Can. 26. No person shall be received into the ministry, nor admitted to any ecclesiastical function, except he shall first subscribe (amongst others) to this article following: that the king's majesty under god is the only supreme governor of this realm, and of all other his highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes, as temporal; and that no foreign prince, person, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, preheminance, or authority, ecclesiastical or spiritual, within his majesty's said realms dominions and countries.

3. *Art. 37.* The queen's majesty hath the chief power in this realm By the thirty nine articles. of England, and other her dominions; unto whom the chief government of all estates of this realm, whether they be ecclesiastical or civil, in all causes doth appertain; and is not, nor ought to be subject, to any foreign jurisdiction. But when we attribute to the queen's majesty the chief government, we give not thereby to our princes the ministring either of god's word, or of the sacraments; but that only prerogative which we see to have been given always to all godly princes in holy scripture by god himself; that is, that they should rule all estates and degrees committed to their charge by god, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil doers. The bishop of Rome hath no jurisdiction in this realm of England.

4. Albeit the king's majesty justly and rightfully is and ought to be the By act of parliament. supreme head of the church of England, and so is *recognised by the clergy* of this realm in their convocations, yet nevertheless, for corroboration and confirmation thereof, and for the increase of virtue in Christ's religion, and to repress all errors, heresies, and other enormities and abuses; it is enacted, That the king our sovereign lord, his heirs and successors kings of this realm, shall be taken accepted and reputed the only supreme head in earth of the church of England; and shall have and enjoy annexed to the imperial crown of this realm, as well the style and title thereof, as all honours, dignities, preheminences, jurisdictions, privileges, authorities, immunities, profits and commodities to the said dignity of supreme head of the same church belonging and appertaining; and shall have power from time to time to visit, repress, redress, reform, order, correct, restrain, and amend all such errors, heresies, abuses, offences, contempts, and enormities whatsoever they be, which by any manner of spiritual authority or jurisdiction may lawfully be reformed, repressed, ordered, redressed, corrected, restrained, or amended most to the pleasure of almighty god, the increase of virtue in Christ's religion, and for the conservation of the peace unity and tranquillity of this realm; any usage, custom, foreign laws, fo-

reign authority, prescription, or any other thing to the contrary notwithstanding. 26 H. 8. c. 1.

Recognised by the clergy of this realm in their convocations] Which recognition, after deliberation and debate in both houses of convocation, was at length agreed upon in these words ——— *ecclesie et cleri anglicani, cujus singularem protectorem unicum, et supremum dominum, et quantum per Christi legem licet, etiam supremum caput ipsius majestatem recognoscimus.* Gibf. 23.

The king's
style and title.

5. Whereas the king hath heretofore been and is justly lawfully and notoriously known named published and declared, to be king of England France and Ireland, defender of the faith, and of the church of England and also of Ireland in earth supreme head, and hath justly and lawfully used the title and name thereof; it is enacted, that all his majesty's subjects shall from henceforth accept and take the same his majesty's style, as it is declared and set forth in manner and form following, viz. *Henry the eighth, by the grace of god king of England France and Ireland, defender of the faith, and of the church of England and also of Ireland in earth the supreme head*: and the said style shall be for ever united and annexed to the imperial crown of this realm. 35 H. 8. c. 3.

Defender of the faith] This title, altho' sometimes attributed to our kings before, yet was peculiarly and in a more solemn manner given to king Hen. 8. by pope Leo 10. for writing against Luther.

And of the church of England and also of Ireland in earth the supreme head] These are the words which seem to be understood, in the abbreviated style of the king, as it is now usually expressed [*defender of the faith, and so forth.*]

Penalty of de-
nying the
king's supre-
macy.

6. By the 1 Ed. 6. c. 12. If any person shall by *open preaching, express words or sayings*, affirm or set forth, that the king is not or ought not to be supreme head in earth of the church of England and Ireland, or any of them, immediately under god; or that the bishop of Rome or any other person than the king of England for the time being is or ought to be by the laws of god supreme head of the same churches or of any of them; he, his aiders comforters abettors procurers and counsellors, shall (on conviction by the oath of two witnesses or confession) for the first offence forfeit his goods and be imprisoned during the king's pleasure; for the second offence shall forfeit his goods, and also the profits of his lands and spiritual promotions during his life, and also be imprisoned during his life; and for the third offence shall be guilty of high treason. f. 6, 22.

And if any person shall by *writing, printing, overt deed or act*, affirm or set forth, that the king is not or ought not to be supreme head in earth of the church of England and Ireland, or of any of them, immediately under god; or that the bishop of Rome, or any other person than the king of England for the time being, is or ought to be by the laws of god or otherwise, the supreme head in earth of the same churches or of any of them; he, his aiders comforters abettors procurers and counsellors,

fellors, shall (on conviction by the oath of two witnesses or confession) be guilty of high treason. *f. 7, 22.*

But no person shall be prosecuted for the said offences by *open preaching or words only*, but within thirty days after such preaching or speaking, if the accusers be within the realm during the said thirty days; if not, then within six months after such preaching or words spoken; and not otherwise. — The accusation to be made to one of the king's council, or to a justice of assize, or a justice of the peace being of the quorum, or to two justices of the peace within the shire where the offence was committed. *f. 19.*

But as to offences made treason by this act, the same is so far repealed, by the 1 *Mar. sess. 1. c. 1.* which enacteth, that no offence made high treason by act of parliament, shall be adjudged high treason, but only such as is expressed in the statute of the 25 *Ed. 3.* But as to the rest this statute continueth in force.

But by the 1 *El. c. 1.* it is further enacted as followeth; viz. that no foreign prince, person, prelate, state or potentate spiritual or temporal, shall use enjoy or exercise any manner of power, jurisdiction, superiority, authority, preheminance or privilege, spiritual or ecclesiastical, within this realm or any other her majesty's dominions or countries; but the same shall be abolished thereout for ever: any statute, ordinance, custom, constitutions, or any other matter or cause whatsoever to the contrary notwithstanding. *f. 16.*

And such jurisdictions, privileges, superiorities and preheminences spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority have heretofore been, or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation order and correction of the same, and of all manner of errors heresies schisms abuses offences contempts and enormities, shall for ever be united and annexed to the imperial crown of this realm. *f. 17.*

And if any person shall by *writing, printing, teaching, preaching, express words, deed or act*, advisedly maliciously and directly affirm, hold, stand with, set forth, maintain, or defend the authority, preheminance, power, or jurisdiction, spiritual or ecclesiastical, of any foreign prince, prelate, person, state or potentate whatsoever, heretofore claimed used or usurped within this realm or any other her majesty's dominions or countries; or shall advisedly maliciously and directly put in ure or execute any thing, for the extolling, advancement, setting forth, maintenance, or defence of any such pretended or usurped jurisdiction, power, preheminance and authority, or any part thereof; he, his abettors aiders procurers and counsellors, shall for the first offence forfeit all his goods, and if he hath not goods to the value of 20 l, he shall also be imprisoned for a year, and the benefices of every spiritual person offending shall also be void; for the second offence shall incur a præmunire; and for the third shall be guilty of high treason. *f. 27—30.*

But no person shall be molested for any offence committed only by *preaching, teaching, or words*, unless he be indicted within one half year after the offence committed. *f. 31.*

Supremacy.

And no person shall be indicted or arraigned but by the oath of two or more witnesses: which witnesses, or so many of them as shall be living, and within the realm at the time of the arraignment, shall be brought face to face before the party arraigned if he require the same. *f. 37.*

Penalty of asserting the pope's supremacy.

7. If any person shall by *writing, cyphering, printing, preaching, or teaching, deed or act*, advisedly and wittingly, hold or stand with, to extol, set forth, maintain or defend the authority jurisdiction or power of the bishop of Rome or of his see, heretofore claimed used or usurped within this realm or in any of her majesty's dominions; or by *any speech, open deed or act*, advisedly and wittingly attribute any such manner of jurisdiction authority or preheminance to the said see of Rome or to any bishop of the same see for the time being; he, his abettors procurers and counsellors, his aiders assistants and comforters, upon purpose and to the intent to set forth, further, and extol the said usurped power, being indicted or presented within one year, and convicted at any time after, shall incur a præmunire. *5 El. c. 1. f. 2.*

And the justices of assize, or two justices of the peace (one whereof to be of the quorum) in their sessions, may inquire thereof, and shall certify the presentment into the king's bench in forty days, if the term be then open; if not, at the first day of the full term next following the said forty days: on pain of 100l. *f. 3.*

And the justices of the king's bench, as well upon such certificate as by inquiry before themselves, shall proceed thereupon as in cases of præmunire. *f. 4.*

But charitable giving of reasonable alms to an offender, without fraud or covin, shall not be deemed abetting, procuring, counselling, aiding, assisting, or comforting. *f. 18.*

Oath of supremacy.

8. The papal incroachments upon the king's sovereignty in causes and over persons ecclesiastical, yea even in matters civil under that loose pretence of *in ordine ad spiritualia*, had obtained a great strength and long continuance in this realm, notwithstanding the security the crown had by the oaths of fealty and allegiance; so that there was a necessity to unrivet those usurpations, by substituting by authority of parliament a recognition by oath of the king's supremacy, as well in causes ecclesiastical as civil; and thereupon the oath of supremacy was framed. *1 H. H. 75.*

Which oath, as finally established by the *1 W. c. 8.* is as follows:
 " I A. B. do swear, that I do from my heart abhor, detest, and abjure,
 " as impious and heretical, that damnable doctrine and position, that
 " princes excommunicated or deprived by the pope or any authority of
 " the see of Rome, may be deposed or murdered by their subjects, or
 " any other whatsoever. And I do declare, that no foreign prince, per-
 " son, prelate, state, or potentate, hath or ought to have any jurisdiction,
 " power, superiority, pre-eminence, or authority, ecclesiastical or spiritual,
 " within this realm: So help me god."

Supremacy limited and defined by the acts of settlement at the revolution.

9. But lastly, the usurped jurisdiction of the pope being abolished, and there being no longer any danger to the liberties of the church or state from that quarter; and divers of the princes of this realm having entertained more exalted notions of the supremacy both ecclesiastical and civil

civil, than were deemed consistent with the legal establishment and constitution; it was thought fit at the revolution to declare and express, how far the regal power, in matters spiritual as well as temporal, doth extend: that so, as well the just prerogative of the crown on the one hand, as the rights and liberties of the subject on the other, might be ascertained and secured. Therefore by the statute of the 1 W. c. 6. it is enacted as followeth:

“Whereas by the law and ancient usage of this realm, the kings and queens thereof have taken a solemn oath upon the evangelists at their respective coronations, to maintain the statutes laws and customs of the said realm, and all the people and inhabitants thereof in their spiritual and civil rights and properties; but forasmuch as the oath it self, on such occasion administered, hath heretofore been framed in doubtful words and expressions, with relation to ancient laws at this time unknown; to the end therefore that one uniform oath may be in all times to come taken by the kings and queens of this realm, and to them respectively administered, at the times of their and every of their coronation, it is enacted, that the following oath shall be administered to every king or queen, who shall succeed to the imperial crown of this realm, at their respective coronations, by one of the archbishops or bishops of this realm of England for the time being, to be thereunto appointed by such king or queen respectively, and in the presence of all persons that shall be attending, assisting, or otherwise present at such their respective coronations: That is to say,

The archbishop or bishop shall say, *Will you solemnly promise and swear, to govern the people of the kingdom of England, and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same?* The king or queen shall say, *I solemnly promise so to do.*

Archbishop or bishop: *Will you to your power cause law and justice in mercy to be executed in all your judgments?* The king or queen shall answer, *I will.*

Archbishop or bishop: *Will you to the utmost of your power maintain the laws of god, the true profession of the gospel, and protestant reformed religion established by law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges, as by law do or shall appertain unto them or any of them?* The king or queen shall answer, *All this I promise to do:* After this, laying his or her hand upon the holy gospels, he or she shall say, *The things which I have here before promised, I will perform and keep; So help me god: And shall then kiss the book.*”

And by the 1 W. sess. 2. c. 2. “Whereas the late king James the second, by the assistance of divers evil counsellors judges and ministers employed by him, did endeavour to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom;

1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of parliament.

2. By committing and prosecuting divers worthy prelates, for humbly petitioning to be excused from concurring to the said assumed power.

3. By

Supremacy.

3. By issuing and causing to be executed a commission under the great seal for erecting a court called The court of commissioners for ecclesiastical causes.

4. By levying money for and to the use of the crown, by pretence of prerogative, for other time, and in other manner, than the same was granted by parliament.

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being protestants, to be disarmed at the same time when papists were both armed and employed, contrary to law.

7. By violating the freedom of election of members to serve in parliament.

8. By prosecutions in the court of king's bench, for matters and causes cognizable only in parliament; and by divers other arbitrary and illegal courses.

9. And whereas of late years, partial corrupt and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason, which were not freeholders.

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.

12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons upon whom the same were to be levied.

All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

And whereas the said late king James the second, having abdicated the government, and the throne being thereby vacant, his highness the prince of *Orange* (whom it hath pleased almighty god to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did, by the advice of the lords spiritual and temporal and divers principal persons of the commons, cause letters to be written to the lords spiritual and temporal, being protestants; and other letters to the several counties, cities, universities, boroughs, and cinque ports, for the choosing of such persons to represent them, as were of right to be sent to parliament, to meet and sit at Westminster upon the 22d day of January in this year 1688, in order to such an establishment, as that their religion laws and liberties might not again be in danger of being subverted: Upon which letters, elections having been accordingly made, and thereupon the said lords spiritual and temporal and commons, pursuant to their respective letters and elections, being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors

cestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties, declare;

1. That the pretended power of suspending laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner, than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the king; and all commitments and prosecutions for such petitioning, are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

7. That the subjects which are protestants, may have arms for their defence, suitable to their conditions, and as allowed by law.

8. That election of members of parliament ought to be free.

9. That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impannelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings, or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example."

The truth is, that after the abolition of the papal power, there was no branch of sovereignty with which the princes of this realm, for above a century after the reformation, were more delighted, than that of being the supreme head of the church: imagining (as it seemeth) that all that power which the pope claimed, and exercised (so far as he was able), was by the statutes abrogating the papal authority annexed to the imperial crown of this realm: not attending to the necessary distinction, that it was not that exorbitant lawless power which the pope usurped, that was thereby become vested in them; but only, that the ancient legal authority and jurisdiction of the kings of England in matters ecclesiastical, which the pope had endeavoured to wrest out of their hands, was reaf-

firmed.

ferted and vindicated. The pope arrogated to himself a jurisdiction, superior not only to his own canon law, but to the municipal laws of kingdoms. And those princes of this realm abovementioned seem to have considered themselves plainly as popes in their own dominions. Hence one reason, why a reformation of the ecclesiastical laws was never effected, seemeth to have been, because it conduced more to the advancement of the supremacy to retain the church in an unsettled state, and consequently more dependent on the sovereign will of the prince. Hence became established the office of lord vicegerent in causes ecclesiastical; and after that, the high commission court; and last of all, the dispensing power, or a power of dispensing with or suspending the execution of laws at the prince's pleasure. Therefore, to remove these grievances, these acts prescribed the just boundaries of the prerogative, both ecclesiastical and civil, and established the rights both of prince and people upon the firmest and surest foundation, namely, the known law of the land; and thereby rendered the name of an english monarch respectable among the princes of the earth. A king ruling by the established laws of his kingdom, that is, with an extensive power of doing right, and an utter inability of doing wrong, is the perfection of the human nature, and the glory of the divine; and renders kings, in a most emphatical sense, god's vicegerents.

From which premisses may be deduced also the genuine cause, why the civil and canon laws have received so much check and discouragement from time to time within this kingdom. They are founded upon the principles of arbitrary power.

The civil law is said to be the common municipal law of all the arbitrary states in Europe (modified only according to the different circumstances of each government); and those princes of this realm who have most affected absolute sovereignty, have been proportionable encouragers of the civil law. The canon law hath the same lineaments and features; being framed to render the pope in the church, what the emperor was in the state. And it must be owned, they are both perhaps more for the ease of the governors, but not so convenient for the governed.

Particularly, as to the enacting part: They owe their very existence to the sovereign will of the supreme governor; and consequently, what is law to day, may not be law to morrow; for the same power which enacteth may repeal.—*For such is our will*—is a harsh and grating sound to an english ear; being the sullen voice of insolence and wanton power. How much more humane is that declaration—*Be it enacted by the king's most excellent majesty, by and with the advice and assent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same.*

Again, as to the executive part, especially with respect to criminal prosecutions—A person accused in the dark; witnesses not confronted with the party face to face; the cruel oath ex officio, whereby a man is compelled to accuse himself; (not to mention the diabolical rack and torture;) and the whole determined at last by the sole decision of the judge,
who

who must needs be oftentimes an entire stranger to the parties; are disparagements of those laws, which will always obstruct their progress in a land of liberty. How much more mild and gentle is that law, which is the birthright of every englishman however otherwise destitute and friendless, whereby he shall not be called upon to answer for any crime he is charged withal, but upon the oaths of at least twelve men of considerable rank and fortune within the county in which the offence is supposed to have been committed, if they shall see probable cause for further inquiry; and afterwards, shall not be condemned, but by the unanimous suffrage of other twelve men, his neighbours and equals in degree and station of life, upon their oaths likewise; and at the same time he hath a right to object to any one who is summoned to try him for his offence, if he hath a reasonable cause of exception.—The one is the law of tyrants; the other of freemen, and may it ever prosper in the british soil!

10. Finally, by the act of union of the two kingdoms of England and Scotland, 5 *An. c.* 8. it is enacted, that after the demise of her majesty queen Anne, the sovereign next succeeding, and so for ever afterwards every king or queen succeeding and coming to the royal government of the kingdom of Great Britain, at his or her coronation, shall in the presence of all persons who shall be attending, assisting, or otherwise then and there present, take and subscribe an oath, to maintain and preserve inviolably the settlement of the church of England, and the doctrine, worship, discipline, and government thereof, as by law established within the kingdoms of England and Ireland, the dominion of Wales, and town of Berwick upon Tweed, and the territories thereunto belonging.

By the act of union of the two kingdoms of England and Scotland.

And shall also swear and subscribe, that they shall inviolably maintain and preserve the settlement of the true protestant religion, with the government, worship, discipline, right, and privileges of the church of Scotland, as then established by the laws of that kingdom.

Surgeons. See Physicians.

Surplice. See Church, and Publick worship.

Surrogate.

BY *Can.* 128. No chancellor, commissary, archdeacon, official or any other person using ecclesiastical jurisdiction, shall substitute in their absence any to keep court for them, except he be either a grave minister and a graduate, or a licensed publick preacher, and a beneficed man near the place where the courts are kept, or a batchelor of law, or a master of arts at least, who hath some skill in the civil and ecclesiastical

Surrogate.

law, and is a favourer of true religion, and a man of modest and honest conversation; under pain of suspension, for every time that they offend therein, from the execution of their offices for the space of three months toties quoties: and he likewise that is deputed, being not qualified as is before expressed, and yet shall presume to be a substitute to any judge, and shall keep any court as aforesaid, shall undergo the same censure in manner and form as is before expressed.

And by the statute of the 26 G. 2. c. 33. No surrogate deputed by any ecclesiastical judge, who hath power to grant licences of marriage, shall grant any such licence before he hath taken an oath before the said judge, faithfully to execute his office according to law, to the best of his knowledge; and hath given security by his bond in the sum of 100l to the bishop of the diocese, for the due and faithful execution of his office.

His office and duty in granting such licences, is treated of in the title **Marriage.**

Suspension.

IN the laws of the church, we read of two sorts of suspension; one relating solely to the clergy, the other extending also to the laity. *Gibf. 1047.*

That which relates solely to the clergy, is suspension from office and benefice jointly, or from office or benefice singly; and may be called a temporary degradation, or deprivation, or both. So we find it described by John of Athon: A person *deposed*, is he who is deprived of his office and benefice, altho' not solemnly; a person *degraded*, is he who is deprived of both solemnly, the ensigns of his order being taken from him; a person *suspended*, is he who is deprived of them both for a time, but not for ever. *Gibf. 1047.*

And the penalty upon a clergyman officiating after suspension, if he shall persist therein after a reproof from the bishop, is (by the ancient canon law) that he shall be excommunicated all manner of ways, and every person who communicates with him shall be excommunicated also. *Gibf. 1047.*

The other sort of suspension, which extendeth also to the laity, is suspension *ab ingressu ecclesiae*, or from the hearing of divine service, and receiving the holy sacrament; which may therefore be called a temporary excommunication. *Gibf. 1047.*

Which two sorts of suspension, the one relating to the clergy alone, and the other to the laity also, do herein agree, that both are inflicted for crimes of an inferior nature, such as in the first case deserve not deprivation, and such as in the second case deserve not excommunication; that both, in practice at least, are temporary; both also terminated, either

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either at a certain time when inflicted for such time, or upon satisfaction given to the judge when inflicted until something be performed which he hath enjoined: and lastly, both (if unduly performed) are attended with further penalties; that of the clergy, with irregularity, if they act in the mean time; and that of the laity (as it seemeth) with excommunication, if they either presume to join in communion during their suspension, or do not in due time perform those things which the suspension was intended to enforce the performance of. *Gibf.* 1047.

By the ancient canon law, sentence of suspension ought not to be given without a previous admonition; unless where the offence is such, as in its own nature requires an immediate suspension: and if sentence of suspension, in ordinary cases, be given without such previous admonition, there may be cause of appeal. *Gibf.* 1046.

Swearing.

1. *CAN.* 109. If any offend their brethren by swearing; the church-wardens or questmen and sidemen, in their next presentment to their ordinaries, shall present the same, that they may be punished by the severity of the laws, according to their deserts: and such notorious offenders shall not be admitted to the holy communion, till they be reformed. By the canon law.

2. By the 19 G. 2. c. 21. If any person shall profanely curse or swear, and be thereof convicted on the oath of one witness before one justice of the peace or mayor of a town corporate, or by confession; every person so offending shall forfeit as followeth: that is to say, every day labourer, common soldier, common sailor, and common seaman, 1s; and every other person under the degree of a gentleman, 2s; and every person of or above the degree of a gentleman, 5s. And if he shall after conviction offend a second time, he shall forfeit double; and for every other offence after a second conviction treble. *f.* 1. By statute.

And if such profane cursing or swearing shall be in the presence and hearing of a justice of the peace, or in the presence or hearing of such mayor as aforesaid; he shall convict the offender without other proof. *f.* 2.

And if it shall be in the presence and hearing of a constable or other peace officer, he shall (if such person be unknown to him) seize, secure, and detain him, and forthwith carry him before the next justice of the peace for the county or division, or before the mayor of such town corporate, wherein the offence was committed; who shall on the oath of such constable or other peace officer convict the offender; but if such person be known to the said constable or other peace officer, he shall speedily make information before such justice or mayor, that the offender may be by him convicted. *f.* 3.

A a a 2

And

Swearing.

And such justice or mayor shall immediately, upon information given upon oath of such constable or other peace officer, or of any other person whatsoever, cause the offender to appear before him; and upon such information being proved as aforesaid, shall convict him. And if he shall not immediately pay down the sum so forfeited, or give security to the satisfaction of such justice or mayor before whom the conviction is made; such justice or mayor shall commit the offender to the house of correction, there to remain and be kept to hard labour for the space of ten days. f. 4.

Provided, that if any common soldier belonging to any regiment in his majesty's service, or any common sailor or common seaman belonging to any ship or vessel, shall be convicted of profane cursing or swearing as aforesaid, and shall not immediately pay down the penalty or give security for the same as aforesaid, and also the cost of the information, summons, and conviction, as by this act is directed; he shall, instead of being committed to the house of correction, be ordered by such justice or mayor to be publickly set in the stocks for the space of one hour for every single offence, and for any number of offences whereof he shall be convicted at one and the same time two hours. f. 5.

And if such justice or mayor shall wilfully and wittingly omit the performance of his duty, in the execution of this act; he shall forfeit 5l, half to the informer, and half to the poor of the parish where he shall reside; to be recovered in any of his majesty's courts of record at Westminster. f. 6.

And if any constable or other peace officer shall wilfully and wittingly omit the performance of his duty, in the execution of this act; and be thereof convicted by the oath of one witness, before one justice or mayor as aforesaid; he shall forfeit 40s, to be levied and recovered by distress and sale, and to be disposed of half to the informer and half to the poor; and if he have not sufficient goods whereon to levy the same, such justice or mayor shall commit him to the house of correction, to be kept to hard labour for one month. f. 7.

And the conviction shall be drawn up in the words and form following:
 Middlesex } *Be it remembred, that on the ——— day of ——— in the ———*
 to wit } *year of his majesty's reign, A. B. was convicted before me one*
of his majesty's justices of the peace for the county, riding, division, or liberty
aforesaid; [or, before me mayor, justice, bailiff, or other chief magistrate of the
city or town of ——— within the county of ——— as the case shall be] of
swearing one or more profane oath or oaths; or, of cursing one or more pro-
fane curse or curses; as the case shall be. Given under my hand and seal, the
day and year aforesaid. f. 8.

Which said form and conviction shall not be liable to be removed by certiorari, but shall be final to all intents. And the said justice or mayor, before whom the conviction shall be, shall cause the same to be fairly wrote upon parchment, and returned to the next general or quarter sessions of the peace for the county, to be filed by the clerk of the peace, and kept amongst the records. f. 8.

The penalties to be disposed of for the benefit of the poor; and all charges of the information and conviction shall be paid by the offender if able,

able, over and above the penalties; which charges shall be settled and ascertained by such justice or mayor (so as that the clerk of such justice or mayor shall have for the information, summons, and conviction of every offender, the sum of 1s and no more. *f. 14.*) And if such party shall not be able, or shall not immediately pay the said charges and expences, or give security for the same to the satisfaction of such justice or mayor; he shall commit him to the house of correction, there to remain and be kept to hard labour for the space of six days, over and above such time for which he may be committed in default of payment of the penalties; and in such case, no charges of information and conviction shall be paid by any person whatsoever. *f. 10.*

And if any action shall be brought against any justice of the peace, constable, or any other person whatsoever, for any thing done in execution of this act; he may plead the general issue, and give the special matter in evidence: and if a verdict shall be given for him, or the plaintiff be nonsuit, or discontinue, he shall have treble costs. *f. 11.*

Provided, that no person shall be prosecuted or troubled for any offence against this statute, unless the same be proved or prosecuted within eight days next after the offence committed. *f. 12.*

And this act shall be publickly read four times a year, in all parish churches and publick chapels, by the parson vicar or curate, immediately after morning or evening prayer, on four several sundays, to wit, the sunday next after Mar. 25. Jun. 24. Sep. 29. and Dec. 25. or in case divine service shall not be performed in any such church or chapel on such sunday, then upon the first sunday after: on pain of forfeiting 5l, for every omission or neglect, to be levied by distress and sale of the offender's goods, by warrant from such justice or mayor. *f. 13.*

And by the 22 G. 2. c. 33. *Art. 2.* All flag officers, and all persons in or belonging to his majesty's ships or vessels of war, being guilty of profane oaths, cursings, execrations, or other scandalous actions, in derogation of god's honour, and corruption of good manners; shall incur such punishment, as a court martial shall think fit to impose, and as the nature and degree of their offence shall deserve.

Synod.

1. **G**ENERAL or oecumenical councils or synods are assemblies of General coun³ bishops from all parts of the church, to determine some weighty cil. controversies of faith or discipline. These were first called by the emperors, afterwards by christian princes; till in the latter ages the pope usurped to himself the greatest share in the calling of them, and by his legates presided in them when called. *Johns. 139.*

By *Art. 21.* General councils may not be gathered together, without the commandment and will of princes; and when they be gathered together

ther (forasmuch as they be an assembly of men, whereof all be not governed with the spirit and word of god) they may err, and sometime have erred, even in things pertaining unto god. Wherefore things ordained by them as necessary to salvation, have neither strength nor authority, unless it may be declared that they be taken out of holy scripture.

But since the great divisions of christendom, especially in the Western church, a free universal synod is scarcely now to be hoped for. *Johns.* 140.

National synod.

2. A national synod consisteth of all the archbishops and bishops within one nation, assembled together to determine any point of doctrine or discipline. The first of this sort which we read of here in England, was that of Herudford (now Hartford) in the year 673. The last was that held by cardinal Pool, in the year 1555. *Johns.* 139.

But altho' national synods be now laid aside, yet upon any great emergency, the synods of the two provinces of Canterbury and York do act by mutual correspondence and joint consent, or by having commissioners from the province of York present in that of Canterbury. *id.* 140.

Provincial synod.

3. A provincial synod consisteth of the metropolitan and the bishops subject to him; being what is now called the *Convocation*, and is treated of in this book under that title.

Diocesan synod.

4. A diocesan synod is the assembly of the bishop and his presbyters, to enforce and put in execution canons made by general councils, or national and provincial synods, and to consult and agree upon rules of discipline for themselves. And these were frequently held, while the bishop and clergy lived together in a community; and were not wholly laid aside, till by the act of submission, 25 H. 8. c. 19. it was made unlawful for any synod to meet, but by royal authority. *Johns.* 140.

Synodals.

SYNODALS and *synodaticum*, by the name, have a plain relation to the holding of synods; but there being no reason why the clergy should pay for their attending the bishop in synod, pursuant to his own citation, nor any footsteps to be found of such a payment by reason of the holding of synods, the name is supposed to have grown, from this duty being usually paid by the clergy when they came to the synod. And this in all probability is the same which was anciently called *cathedraticum*, as paid by the parochial clergy, in honour to the episcopal chair, and in token of subjection and obedience thereto. So it stands in the body of the canon law, "No bishop shall demand any thing of the churches but the honour of the cathedraticum, that is, two shillings" (at the most, saith the gloss, for sometimes less is given.) And the duty which we call synodals, is generally such a small payment: which payment was reserved by the bishop, upon settling the revenues of

of the respective churches on the incumbents; whereas before, those revenues were paid to the bishop, who had a right to part of them for his own use, and a right to apply and distribute the rest, to such uses, and in such proportions, as the laws of the church directed. *Gibf.* 976.

Synodals are due of common right to the bishop only: So that if they be claimed or demanded by the archdeacon, or dean and chapter, or any other person or persons; it must be upon the foot of composition or prescription. *id.*

And if they be denied where due, they are recoverable in the spiritual court: And in the time of archbishop Whitgift, they were declared, upon a full hearing, to be spiritual profits; and, as such, to belong to the keeper of the spiritualties *fedē vacante*. *Gibf.* 977.

Also constitutions made in the provincial or diocesan synods, were sometimes called *synodals*; and were in many cases required to be published in the parish churches: in which sense the word frequently occur-
reth in the ancient directories.

Templars. See Monasteries.

Temporalities (of bishopricks). See Bishops.

Tenths. See First fruits.

Terrier.

B*Y Can.* 87. The archbishops and all bishops within their several dioceses, shall procure (as much as in them lieth) that a true note and terrier of all the glebes, lands, meadows, gardens, orchards, houses, stocks, implements, tenements, and portions of tithes lying out of their parishes, (which belong to any parsonage, vicarage, or rural prebend,) be taken by the view of honest men in every parish, by the appointment of the bishop, whereof the minister to be one; and be laid up in the bishop's registry, there to be for a perpetual memory thereof.

It may be convenient also, to have a copy of the same exemplified, to be kept in the church chest. *God. Append.* 12.

These terriers are of greater authority in the ecclesiastical courts, than they are in the temporal; for the ecclesiastical courts are not allowed to be courts of record: and yet even in the temporal courts these terriers are of some weight, when duly attested by the register. *Johnf.* 242.

Especially if they be signed, not only by the parson and churchwardens, but also by the substantial inhabitants: but if they be signed by the parson

Terrier.

son only, they can be no evidence for him; so neither (as it seemeth) if they be signed only by the parson and churchwardens, if the churchwardens are of his nomination. But in all cases they are certainly strong evidence against the parson. *Theory of Evidence.* 45.

Form of a terrier.

A True note and terrier of all the glebes, lands, meadows, gardens, orchards, houses, stocks, implements, tenements, portions of tithes, and other rights, belonging to the vicarage and parish church of Orton, otherwise Overton, in the county of Westmorland, and diocese of Carlisle, now in the use and possession of Richard Burn, clerk, vicar of the said church; taken, made, and renewed according to the old evidences and knowledge of the ancient inhabitants, this tenth day of November in the year of our lord one thousand seven hundred and forty nine, by the appointment of the right reverend father in god Richard lord bishop of Carlisle, at his primary visitation held at Appleby in the said county and diocese aforesaid, the eighth day of June in the same year, and exhibited before the reverend and worshipful John Waugh, doctor of laws, chancellor of the aforesaid diocese, on the twentieth day of November in the year aforesaid.

Imprimis, One slated dwelling house, in length fifty one feet, in breadth nineteen feet, within the walls. One thatched barn, stable, cow house, and peat house, contiguous to each other under the same roof; in length eighty one feet, in breadth twenty one feet, without the walls. One other little stable, in length thirteen feet, in breadth twelve feet and an half; adjoining to the peat house at the south-west side and end. Item, The church yard, containing three roods and nineteen perches; adjoining to the grounds of Robert Teafdale on the south, of Richard Alderson on the west and north, and to a close belonging to the said vicarage, called prior garth, on the east: The walls and gates thereof round about made by the parish. Item, One inclosure called prior garth, containing three roods and seven perches; adjoining to the church lane on the south, to the church yard on the west, to the ground of Richard Alderson on the north, and to the highway on the east: Through which there lies a foot path from the vicarage house to the church, but for no other purpose: The wall and hedge on the south, north, and east made by the vicar; and on the west, where it adjoins to the church yard, by the parish. Item, One garden, containing one rood and eleven perches; adjoining to the vicarage garth, and to the ends of the barn and of the dwelling house, on the south; to the highway on the west, and north; and to the said garth on the east: The fence round about made by the vicar. Item, one parroch, containing twenty four perches and an half; adjoining to Orton green on the south, to the highway on the west, to the end of the dwelling house on the north, and to the vicarage garth on the east: The fence round about made by the vicar. Item, One garth, containing one acre, fifteen perches and an half; adjoining to the grounds of John Powley, Daniel Teafdale, and Orton green on the south; to the said parroch, barn, and garden on the west; to the peat house end, garden, and highway on the north; and to a close belonging to the said vicarage, called corn close, on the east: The fence round about made

made by the vicar, except that John Powley makes the fence where it adjoins to his ground, and Daniel Teasdale from thence to the bottom of the old lime kiln: Through which garth lies a foot path for the said John Powley and Daniel Teasdale to and from their said grounds, and likewise a driving way for their sheep; which they frequented whilst the common field was uninclosed, but is now become almost useless. Item, One inclosure, called corn close, containing one acre, one rood, and twenty one perches; adjoining to the said John Powley's lane, and to a piece of ground before his barn called a steer-room, and to his garth, on the south; to the vicar's said garth, on the west; to the highway on the north; and to the highway and John Powley's lane on the east: The fence all about made by the vicar, except where it adjoins to John Powley's garth and barn. All which said corn close, garth, garden, and parrock, have been inclosed ground for time immemorial, and the vicar in respect thereof hath not repaired any part of the highways adjoining thereunto. Opposite to the same, on the north side, is an inclosure made by Daniel Teasdale, about nine years ago, by which the highway was made into a lane. Item, One inclosure called fore-dale, containing three acres and fifteen perches; adjoining to the grounds of Robert Teasdale and John Nelson on the south, of John Nelson on the west, of John Powley and Robert Teasdale on the north, and of Robert Teasdale on the east: All the fence made by the vicar, except where it adjoins to the said John Nelson's inn-croft, and except half the length of the said John Nelson's out-croft, from the middle to the east end, the said John Nelson's fence being stone wall: From the east end of which inclosure lies a way through Robert Teasdale's ground, which the present incumbent purchased of the said Robert Teasdale, to an inclosure belonging to the said vicar (but not to the vicarage), called long roods; which is to continue for ever, and may be of use if at any time hereafter the said two inclosures (fore-dale and long roods) shall be occupied by the same person, or otherwise. Item, One other inclosure, called the greater mil-brow, containing one acre, three roods and seven perches; adjoining to the ground of John Powley on the south, to a tillage way enjoyed and repaired by the said vicar on the west, to the ground of Thomas Ireland on the north, and of John Powley on the east: All the fence made by the vicar, except about sixteen yards of stone wall at the north east end, belonging to John Powley. Item, one other inclosure, called little mil-brow, containing twenty eight perches; adjoining to the ground of John Powley on the south, of Isabel Atkinson on the west, of Isabel Atkinson and Thomas Ireland on the north, and the said tillage way on the east: The fence all made by the vicar: Through the south west corner of which inclosure is the ancient watercourse. The said three last inclosures were made out of the common field by the present incumbent. Item, One other inclosure, called glebe close, lying at Firbiggins, containing eight acres and three roods; adjoining to the ground of Elizabeth Turner on the south, of Elizabeth Turner and William Thwaytes on the west, of William Thwaytes on the north, and to the common on the east: The wall at the east end is made by the vicar, at the west end by Elizabeth Turner and William Thwaytes: The right of repairing the fence on the north side, and on the south side is in dispute, and not yet determined. At the end of Elizabeth Turner's house, an oak gate is to be maintained by the

owners of coat garth; for which they enjoy a liberty of ingress and egress for themselves and families, and liberty of driving cattle in the winter from martinmas to lady day, doing as little damage as may be; and of passing with peats or other firing in summer. Belonging to the said glebe close, and occupied therewith, there is likewise a parcel of ground, leading from the said gate at Elizabeth Turner's house end, north-eastward, to the said glebe close, having the wall on the left hand, and mered out from Elizabeth Turner's ground on the right, in breadth three yards or upwards, being the way to and through the said glebe close. Item, Another parcel of ground, in the common field, called north lands, containing two roods and five perches; adjoining to the ground of Robert Teasdale on the south, of John Nelson on the west and north, and of Robert Teasdale on the east. Item, Another parcel of ground in the common field, called pot-lands head, containing one rood; adjoining to the ground of Robert Teasdale on the south, of Elizabeth Waller on the west down by the runner, of John Nelson on the north, and of Robert Teasdale on the east. All which said lands, containing in the whole nineteen acres and upwards, are situate within the lordship and manor of Orton, free from the payment of any fines, rents, or services to any chief lord; the royalties of which said lands are also in the vicar. Item, a parcel of peat moss in Orton low moor, containing by estimation ten acres, known by the name of the vicar's moss.

Item, to the said vicarage is also belonging the tithe of wool throughout the parish; and the manner of tithing is this: The owner lays his whole year's produce in five parcels or heaps; the vicar, or person employed by him, chuseth one of the five heaps, which he pleaseth, and divides the same into two parts; of which two parts the owner chuseth one, and leaves the other to the vicar for his tenth part. Item, the tithe of lambs in their proper kind throughout the parish; and the custom concerning them is this: If a person's number is one, he pays a penny; if two, he pays two pence; if three, he pays three pence; if four he pays four pence; if five, he pays half a lamb; if six, a whole lamb, the vicar paying back four pence; if seven, three pence; if eight, two pence; if nine, one penny; if ten, the vicar hath a lamb complete: And in like manner for every number above ten. And if a man's number is under fifty, the tithe is taken thus; the owner takes up two, then the vicar takes one; next the owner takes nine, then again the vicar one; and so on, till the vicar hath taken the number due to him: if they are fifty, or upwards, they are put into a place together, and run out singly thro' a hole or gap; the two first that come out are the owner's; the third the vicar's; then the owner has the next nine; then the vicar one; and so on, till the vicar hath his number. And if sheep are sold in the spring, the tithe of lambs is paid by the person with whom they were lambed, whether seller or buyer. Item, the tithe of geese, taken up about michaelmas, in the same manner as the lambs; except that whereas a penny is paid on the account of each odd lamb, an halfpenny only is paid for each odd goose. Item, the tithe of pigs in like manner. Item, the tithe of eggs about easter; two eggs for each old hen and duck, and one egg for each chicken and duck of the first year. Item, by every person who sows hemp, is paid yearly one penny. Item, for each plough is paid yearly one penny. Item, by every person keeping bees is paid yearly

yearly one penny. Item, an oblation of four pence at every churching of women. Item, for every wedding by publication of banns, one shilling; by licence, ten shillings. Item, for every funeral (without a sermon) six pence. Item, mortuaries, according to act of parliament. Item, for every person of age to communicate, three halfpence yearly, due at easter. Item, a pension of twenty shillings yearly out of the rectory of Sedbergh in the county of York. — The glebe, tithes, and profits of the vicarage, are worth at the improved value, communibus annis, about ninety pounds a year.

There is also due to the parish clerk; for every family keeping a separate fire, three pence yearly. For every wedding by publication, or by licence, one shilling. For every funeral six pence. For every proclamation in the church yard, two pence.

To the sexton for making a grave, six pence.

Belonging to the said parish — are, first, The parish church, an ancient building, containing in length (with the chancel) ninety six feet, in breadth forty eight feet: The chancel in breadth one part thirty feet, the other part twenty one feet. The steeple fifteen foot square within the walls, in height sixty feet. Within, and belonging to which, are, one communion table with a covering for the same of green cloth. Also one linen cloth for the same, with two napkins. Two pewter flaggons. Two silver chalices, weighing about ten ounces each. One paten. One basin for the offertory. One table of degrees. One chest with three locks, in the vestry; of little use because of the damp. One pulpit and reading desk, made in the year 1742. One pulpit cushion, covered with green cloth. One large bible of the last translation. Two large common prayer books. The book of homilies. Comber on the common prayer, and Tillotson's first volume of sermons, given by Mr Thomas Hastwell, merchant in London, 1703. The king's arms with the ten commandments. One church clock. Four bells with their frames: The first, or least bell, being two feet seven inches and an half in diameter; with this inscription [Jesus be our speed, 1637.] The second, two feet and eleven inches in diameter, with an ancient inscription [omnium animarum], perhaps by a mistake of the bell-founder for [omnium sanctorum,] to whom the church is dedicated: The third, three feet and two inches in diameter; with this inscription [soli deo gloria, 1637.] The fourth, or largest, three feet six inches and an half in diameter; with this inscription [Mr Tho. Nelson, vicar. John Bowness. John Winter. 1711.] Two biers. One herse cloth. Two surplices. Three parchment register books; one, beginning in 1596, and ending 1646, imperfect; the second, beginning 1654, and ending 1743, compleat; the third, beginning 1743, and continued to the present time. The seats in the church and chancel (except the vicar's pew) have been repaired for time immemorial at the publick expence of the parish. There are also several new common seats erected this year by the churchwardens, at the low end of the church, adjoining to the belfry. — There is also belonging to the said parish, the rectory thereof, together with the tithes of corn, hay, calves, milk, and other dues, which did formerly belong to the priory of Conieshead in Lancashire, and after the dissolution of monasteries were purchased by the inhabitants. — Also the advowson of the vicarage, which did belong to the said priory, and was likewise purchased with the rectory. — Also

one box with three locks, in the keeping of John Unthank of Orton; in which are the purchase deeds of the rectory and advowson; a copy of the endowment of the vicarage in 1263; the purchase deeds of the manors of Orton and Raisbeck by the inhabitants; bounder rolls; and other publick writings.

— There is also belonging to the said parish, one inclosure in the lordship of Raisbeck, called Barrough close, containing by estimation fifteen acres, of the yearly rent of six pounds; adjoining to the river Lune on the south, to the ground of Thomas Fothergill on the west, to the common on the north, and to the grounds of Leonard Scaife on the east: The fence on the south made by the parish; on the west by the parish and Thomas Fothergill, each a part; on the north, by the parish; and on the east by the parish and Leonard Scaife, each a part. — Also the sum of twenty pounds, in the hands of Thomas Winter of Wood-end, given by John Dalston, esquire, of Acornbank. Also, the sum of three pounds ancient poor stock, in the hands of the administrators of the late George Overend of Raisbeck. Also the sum of ten pounds, now in the hands of the vicar, given by Daniel Wilson, esquire, of Dalham Tower. Also the sum of five pounds, in the hands of Mr Edward Branthwaite of Carlingill, given by him towards a fund for the poor stock. Also the sum of five pounds in the hands of Thomas Hodgson of Tebay-gill Edge, given by Mr Robert Harrison of Low Seales, deceased, for the same purpose. The interest of which money, and the rent of which inclosure, are applied by the churchwardens and overseers of the poor, by the direction of the Twelve, to the relief of the poor, and defraying other parish charges. Which said Twelve men are chosen yearly in easter week at a vestry meeting by a majority of votes, to be sidersmen and a select vestry for the year ensuing.

There are also three schools in the said parish. One at Orton, lately built by the inhabitants, and endowed by Agnes Holme of Orton, widow, with a parcel of land lying in Orton field, containing by estimation one acre, of the present yearly rent of ten shillings; adjoining to the grounds of Christopher Parker on the south, west, and east, and to a land belonging to the vicarage of Burgh on the north: Endowed also by Robert Wilson of Long Sleddale, yeoman, with the sum of five pounds, now in the hands of Thomas Green of Langdale. — Another school at Tebay; founded by Robert Adamson of Blacket Bottom in Grayrigg, gentleman, in the year 1672, and endowed by him with the estates called Ormondie Biggin and Blacket Bottom in Grayrigg, now of the yearly rent of sixteen pounds. — Another school at Greenholme, founded by George Gibson of Greenholme, gentleman, in the year 1733, and endowed by him with four hundred pounds original bank stock; of the yearly produce of about twenty two pounds.

In testimony of the truth of the before mentioned particulars, and of every of them; we, the minister, churchwardens, and principal inhabitants, have set our hands the said tenth day of November, in the year of our lord one thousand seven hundred and forty nine.

Ri. Burn, vicar.

Joseph

Terrier.

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Joseph Powley	} Churchwardens.
John Bowness	
Edmund Dent	
Stephen Matthews	
George Wilfon	
Will: Rowlandfon	}

John Unthank	} Eleven of the Twelve, one of them being dead.
John Nelson	
John Bowness	
Robert Bowness	
John Wilfon	
Jonathan Whitehead	
Edward Branthwaite	
Thomas Brown	
John Wilfon	
William Atkinson	}
John Farrer	

Note, In 2 *Dugd. Monast.* 424. There is a copy of a charter of king Edward the second, confirming (amongst others) a grant which had been made to god and saint Mary and the house of *Conyngesheved* and the confreres there, by Gamellus de Penigton, of the churches of Penigton and Molcastre with their chapels and other appurtenances, and of the church of Wytebec, and of the church of *Skeroverton* [so denominated from the Islandic skier, a scar, or rock, (which word is still in use in the county of Lancaster;) the town of Orton being situate under the mountain which still beareth the name of Orton-Scar.]

[Note, *Conynges-beved* is the same as *king's-head*; from the Saxon *cynig*, or *conig*, which signifieth king; and *heafod*, head.]

Tithes.

Oblations, offerings, prestations, pensions, and other church dues not properly tithes, are treated of under their respective titles.

I. Origin of tithes in England.

II. Of the several kinds of tithes, with their nature and properties.

III. Of what things tithes shall be paid; and therein of exemptions and discharges from tithes.

IV.

- IV. Of modus's, or exemptions from payment of tithes in kind; and therein of custom and prescription.
- V. Of the several particulars tithable.
- VI. Of the setting out, and the manner of taking and carrying away of tithes.
- VII. Tithes how to be recovered.
- VIII. Tithes in London.

I. Origin of tithes in England.

What was paid to the church for several of the first ages after Christ, was all brought to them by way of offerings; and these were made either at the altar, or at the collections, or else occasionally. *Prideaux on tithes.* 139.

Afterwards, about the year 794, Offa king of Mercia (the most potent of all the Saxon kings of his time in this island) made a law, whereby he gave unto the church the tithes of all his kingdom; which, the historians tell us, was done to expiate for the death of Ethelbert king of the East Angles, whom in the year preceding he had caused basely to be murdered. *id.* 165.

But that tithes were before paid in England by way of offerings, according to the ancient usage and decrees of the church, appears from the canons of Egbert archbishop of York about the year 750; and from an epistle of Boniface archbishop of Mentz, which he wrote to Cuthbert archbishop of Canterbury about the same time; and from the seventeenth canon of the general council held for the whole kingdom at Chalchuth, in the year 787. But this law of Offa was that, which first gave the church a civil right in them in this land by way of property and inheritance, and enabled the clergy to gather and recover them as their legal due, by the coercion of the civil power. *id.* 167.

Yet this establishment of Offa reached no further than to the kingdom of Mercia, over which Offa reigned; until Ethelwulph, about sixty years after, enlarged it for the whole realm of England. *id.* 167.

II. Of the several kinds of tithes, with their nature and properties.

Division of
tithes into
prædial, mixt,
and personal.

1. Tithes, with regard to their several kinds or natures, are divided into *prædial*, *mixt*, and *personal*:

Prædial

Prædial tithes are such as arise merely and immediately from the ground; as grain of all sorts, hay, wood, fruits, herbs: for a piece of land or ground being called in latin *prædium* (whether it be arable, meadow, or pasture), the fruit or produce thereof is called *prædial*, and consequently the tithe payable for such annual produce is called a *prædial* tithe. *Watf. c. 49.*

Mixt tithes are those which arise not immediately from the ground, but from things immediately nourished by the ground, as by means of goods depastured thereupon, or otherwise nourished with the fruits thereof; as colts, calves, lambs, chickens, milk, cheese, eggs. *Watf. c. 49.*

Personal tithes are such profits as do arise by the honest labour and industry of man, employing himself in some personal work, artifice, or negotiation; being the tenth part of the clear gain, after charges deducted. *Watf. c. 49.*

2. Tithes, with regard to value, are divided into *great* and *small*:

Great tithes; as corn, hay, and wood. *Degge, part 2. c. 1.*

Small tithes; as the *prædial* tithes of other kinds, together with those which are called *mixt*, and *personal*. *Gibf. 663.*

Division of
tithes into
great and
small tithes.

But it is said, that this division may be altered, (1) By custom; which will make wood a small tithe, under the general words *minutæ decimæ*, in the endowment of the vicar. (2) By quantity; which will turn a small tithe into great, if the parish is generally sown with it. (3) By change of place; which makes the same things, as hops in gardens small tithes, in fields great tithes. But this seems to be contradicted in the case of *Wharton* and *Lisle, E. 5 W.* where the tithe of flax, tho' sown in great fields, was adjudged to the vicar as a small tithe, Holt chief justice (who was of another opinion) being absent. *4 Mod. 184. Gibf. 663.*

And Dr Watson is of opinion, that the quantity of land within any parish sowed with any thing, cannot make the tithe of another nature; and that what is called small tithes seemeth to be in respect of the thing itself, and not from the small quantity of land sowed therewith, whereby the tithes thereof are but small, and of little value; for if that were to be the rule to determine what shall be said to be small tithes, then corn and hay in some places might be accounted small tithes. *Watf. c. 39.*

And according to this latter opinion the law is now settled; namely, that the tithes are to be denominated great or small tithes, according to the nature and quality thereof, and not according to the quantity.

3. It is said by lord Coke and many others, that before the council of Lateran in the year 1180, a man might have given his tithes to what church or monastery he pleased.

Tithes re-
strained to the
proper parish.

But this Dr Prideaux doth utterly deny, for two reasons; 1. Because of the absurdity of the thing; for all the laws which had been made for tithes would have signified nothing, if no one had been certainly invested in a right to them; for in such case, no one could claim them, and in case of non-payment no one could make process in law for them; and consequently no one having a special right to demand them, it must have followed in practice, that what was thus paid to every spiritual person, would in fact and reality be paid to none at all. 2. Be-
cause

cause before the said council there were in this land many appropriations, whereby the tithes of whole parishes were assigned to convents or other spiritual corporations; all which would have signified nothing, if the parishioners had been at liberty to pay their tithes to what spiritual person they should think fit. *Prid.* 302.

But be that as it will, it is certain that now tithes of common right do belong to that church, within the precincts of whose parish they arise.

Portion of
tithes within
another parish.

4. Yet notwithstanding, one parson may prescribe to have tithes within the parish of another; and this is what is called a *portion of tithes*. *Gibf.* 663.

One reason of which might be, the lord of a manor's having his estate extending into what is now apportioned into distinct parishes; for there were tithes before the present distribution of parishes took place.

But whatever original these portions might have, they are in law so distinct from the rectory, that if one who hath them do purchase the rectory, the portion is not extinct, but remaineth grantable. But as to the cognizance thereof, the case being between parson and parson, and concerning a spiritual matter; that belongs, like the cognizance of other tithes, to the ecclesiastical court. *Gibf.* 663.

Tithes in
extraparochial
places.

5. Tithes extraparochial, or within the compass of no certain parish, belong to the crown. By the canon law, they were to be disposed of at the discretion of the bishop; but by the law of England, all extraparochial tithes, as in several forests, do belong to the king, and may be granted to whom he will. And accordingly they have been actually adjudged to him, not only by several resolutions of law; but also in parliament, in the case of the prior and bishop of Carlisle, in the 18th of Edward the first, concerning tithes in Inglewood forest, to wit, that the king in his forest aforesaid may build towns, assart lands (or make them fit for tillage), and confer those churches, with the tithes thereof, at his pleasure, upon whomsoever he pleaseth; because that the same forest is not within the limits of any parish. 1 *Roll's Abr.* 657. 2 *Inst.* 647.

III. Of what things tithes shall be paid; and therein of exemptions and discharges from tithes.

Things that
renew yearly.

1. Of common right tithes are to be paid for such things only as do yield a yearly increase by the act of god. *Watf. c.* 46. 1 *Roll's Abr.* 641.

Yet this rule admits of some exceptions; as for instance, tithe is due of saffron, tho' gathered but once in three years: and concerning sylva cædua, there is an entry in the register, that consultations shall be granted thereof, notwithstanding that it is not renewed every year. *Gibf.* 669.

Once in the
year.

2. Generally, of things increasing yearly, tithes shall be paid only once in the year. *Gibf.* 669.

But this rule also is not universally true. And it is evidently against the rule of the canon law; which requireth, that if seeds be sown upon the same ground, and renew oftner than once in the year, the tithes thereof shall be paid so often as they do renew. And this seemeth still

to be the law; as in the case of clover, for instance, which reneweth oftner than once in the year, tithes thereof shall be paid as often as it doth renew.

3. Of common right, no tithes are to be paid of quarries of stone or slate, for that they are parcel of the freehold, and the parson hath tithes of the grafs or corn which grew upon the surface of the land in which the quarry is; so also, not for coal, turf, flags, tin, lead, brick, tile, earthen pots, lime, marle, chalk, and such like; because they are not the increase, but of the substance of the earth. And the like hath been resolved of houses (considered separately from the soil) as having no annual increase. But by particular custom, tithes of any of these may be payable. 2 Inst. 651. Things of the substance of the earth.

4. By the common law of England, there is no tithe due for things that are feræ naturæ; and therefore it hath been resolved, that no tithe shall be paid for fish taken out of the sea, or out of a river, unless by custom, as in Wales, Ireland, Yarmouth, and other places: neither, for the same reason, is any tithe due of deer, conies, or the like. But if the tithe thereof be due by custom, it must be paid. Degge p. 2. c. 8. 2 Inst. 651. Things feræ naturæ.

5. By the statute of the 2 & 3 Ed. 6. c. 13. *All such barren, heath, or waste ground, other than such as be discharged from the payment of tithes by act of parliament, which before this time have lain barren, and paid no tithes by reason of the same barrenness, and now be or hereafter shall be improved and converted into arable ground or meadow, shall after the end and term of seven years next after such improvement fully ended and determined, pay tithe for the corn and hay growing upon the same.* 1. 5. Barren land

Provided, that if any such barren, waste, or heath ground hath before this time been charged with the payment of any tithes, and the same be hereafter improved or converted into arable ground or meadow; the owner thereof shall, during the seven years next after the said improvement, pay such kind of tithe as was paid for the same before the said improvement. 1. 6.

Barren] Altho' it doth yield some fruit, and do pay tithes for wool and lamb or the like, yet if it be barren land as to agriculture or tillage, which this clause meant to advance, it is within this act. 2 Inst. 655.

But yet if the ground be not apt for tillage, yet if it be not of its own nature barren, it is not within this act. As if a wood be stubbed and grubbed, and made fit for the plough, and employed thereunto; yet it shall pay tithes presently: for wood ground is fertile, and not barren. 2 Inst. 656. Bunb. 159.

In the case of *Stockwell and Terry*, July 14, 1748, it was held by lord Hardwicke, that such land only is within this clause, as above the necessary expence of inclosing and clearing, requires also expence in manuring, before it can be made proper for agriculture; and he decreed tithe to be paid, on its being proved, that the land bore better corn than the arable land in the parish, without any extraordinary expence of manure.

In a prohibition between *Sharington* and *Fleetwood*, *H. 38 Eliz.* for tithes in *Orwell* in the county of *Lancaster*, it was resolved, that if marsh meadow, or other land, for not cleansing of the trenches or sewers, or by sudden accident, or inundation of waters, be surrounded; or by ill husbandry or unprofitable negligence any land become overrun with bushes, furfe, whins, and briers; yet are not they or any of them said to be barren land within this statute, because of their own nature they are fruitful; and the parson shall not by this act be barred of his tithes, by the ill husbandry or negligence of the owner or possessor. *2 Inst. 656.*

Shall after the end and term of seven years next after such improvement fully ended and determined pay tithe]. Note, here are no express words of discharge of the tithes during the seven years; but by reasonable construction it doth impliedly amount to a discharge during the seven years: and the seven years are to be accounted next after the improvement. *2 Inst. 656.*

The trial whether lands are barren or not within the statute, must be in the temporal, and not in the spiritual court. And therefore in a suit for tithes in the spiritual court, if the defendant plead that it is barren land, and that plea be refused, or issue taken upon it, there a prohibition shall be granted. But a prohibition shall not be granted upon a suggestion only that it is barren land, before it be pleaded in the spiritual court. *Degge p. 2. c. 19. 1 Keb. 253.*

Forest land.

6. As lands which are in no parish, pay tithes to the king; so lands lying within the precincts of a forest (tho' also in a parish) if they be in the hands of the king, do pay no tithes. And this privilege extends to the king's lessee, but not to his feoffee. But if the forest be disafforested, and be within any parish; then they ought to pay tithes in the hands of the king's lessee. *Bob. 163, 177. Gibf. 680.*

It hath been questioned, where a park hath paid a modus, and is disparked, whether the modus shall continue, or be discharged and tithes paid in kind; and all the books are clear, that if the modus was a certain consideration in money for all the tithes of such a park, such modus shall hold, notwithstanding it be disparked; but if the modus was, for the deer and herbage of such a park, the modus is gone, upon disparking. *Gibf. 684. Watf. c. 47.*

In like manner, if the modus hath been to pay a buck and a doe for all the tithes of such a park, and the park is disparked, the modus shall continue, and the owner may give a buck and a doe out of another park; but if it was, to pay the shoulder of every deer, or expressly a buck or a doe out of the same park, the modus is gone. *Gibf. 684. Watf. c. 47.*

But where the modus was, part in money, and part in venison out of the park (namely, two shillings and the shoulder of every deer); the court was divided, two being of opinion that the two shillings continued, and that the spiritual court should assign an equitable recompence for the shoulders, according to the number that had been usually paid; and the other two, that the money and venison making one intire modus, the one being gone, the whole was dissolved. *Gibf. 684. Watf. c. 47.*

7. Glebe

7. Glebe lands in the hands of the parson shall not pay tithe to the Glebe land. vicar, tho' endowed generally of the tithes of all lands within the parish; nor being in the hands of the vicar, shall they pay tithe to the parson: and this is according to the known maxim of the canon law, that the church shall not pay tithes to the church. But if the vicar be specially endowed of the small tithes of the glebe lands of the parsonage; then he shall have them, tho' they are in the hands of the appropriator. *Gibf. 661. Deg. p. 2. c. 2.*

If a parson lease his glebe lands, and do not also grant the tithes thereof; the tenant shall pay the tithes thereof to the parson. *Deg. p. 2. c. 2. 1 Roll's Abr. 655.*

And if a parson lets his rectory, reserving the glebe lands; he shall pay the tithes thereof to his lessee. *Gibf. 661.*

If a parson sow his glebe, and dieth before severance, and afterwards his successor is inducted, and his executor or vendee severeth the corn; the successor shall have the tithe thereof: for altho' the executor represent the person of the testator, yet he cannot represent him as parson, inasmuch as another is inducted. *1 Roll's Abr. 655.*

Otherwise, if the parson dieth after severance from the ground, and before the corn is carried off; in this case, the successor shall have no tithe: because, tho' it was not set out, yet a right to it was vested in the deceased parson by the severance from the ground. The same is true in case of deprivation, or resignation, after glebe sown: the successor shall have the tithe, if the corn was not severed at the time of his coming in; otherwise if severed. *Gibf. 662.*

8. All abbots and priors, and other chief monks originally paid tithes Abbey land. as well as other men, until pope Paschal the second exempted generally all the religious from paying tithes of lands in their own hands. And this continued as a general discharge, till the time of king Henry the second, when pope Hadrian the fourth restrained this exemption to the three religious orders only of Cistercians, Templars, and Hospitalers; unto which pope Innocent the third added a fourth, to wit, the Præmonstratenses. And this made up the four orders, which are commonly called the privileged orders; for that they claimed a privilege to be discharged of tithes by the pope's establishment.

Then came the general council of Lateran in the year 1215, and further restrained the said exemption from tithes of lands in their own occupation, to those lands which they were in possession of before that council.

But the Cistercians, as it appeareth, in process of time did procure bulls to exempt also their lands which were letten to farm: For the restraining of which practice, the statute of the 2 H. 4. c. 4. was made; by which it was enacted, that as well they of the said order, as all other religious and seculars, which should put the said bulls in execution, or from thenceforth should purchase other such bulls, or by colour thereof should take advantage in any manner, should incur a præmunire.

So that this statute restrained them from purchasing any such exemptions for the future; and as to the rest, left their privileges as they were before

before the said statute, that is to say, under a limitation to such lands only as they had before the Lateran council aforesaid; and it is certain they obtained many lands after that council, which therefore were in no wise exempted: And also the said statute left them, as it found them, subject to the payment of divers compositions for tithes of their demefn lands made with particular rectors; who, contesting their privileges even under that head, brought them to compound. Which two restraints were also followed by a third, at the time of the dissolution; when, as many of them as did not fall under the statute of the 31 H. 8. c. 13. lost their exemptions, there being no saving clause in the acts of their dissolution or surrender to preserve or to revive them.

But as to those which were dissolved by the 31 H. 8. c. 13. it is enacted as followeth; viz. *Where divers abbots, priors, and other ecclesiastical governors of the monasteries, abbatbies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places dissolved by this act, have had divers parsonages appropriated, tithes, pensions, and portions, and also were acquitted and discharged of the payment of tithes for their monasteries or other religious and ecclesiastical houses and places as aforesaid, manors, messuages, lands, tenements and hereditaments; it is enacted, that as well the king our sovereign lord, his heirs and successors, as all other persons, their heirs and assigns, who shall have any of the said monasteries, abbatbies, priories, nunneries, colleges, hospitals, houses of friers, or other ecclesiastical houses or places, sites, circuits, precincts of the same or any of them, or any manors, messuages, parsonages appropriate, tithes, pensions, portions, or other hereditaments, which belonged to any such religious house, shall hold and enjoy as well the said parsonages appropriate, tithes, pensions, and portions of the said monasteries, abbatbies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, sites, circuits, precincts, manors, meases, lands, tenements, and other hereditaments, according to their estates and titles, discharged and acquitted of payment of tithes, as freely and in as large and ample manner, as the said late abbots priors and other ecclesiastical governors held and enjoyed the same.* f. 21.

By reason of which discharge from tithes of lands which were given to the king by this act, and which were discharged in the hands of the religious, it hath been more strictly inquired, what were the houses dissolved by this act, than by any other of the acts of dissolution; which will best appear by the following catalogue:

Catalogue of monasteries of the yearly value of 200l or upwards, dissolved by the statute of the 31 H. 8. and by that means capable of being discharged of tithes: In which are the following abbreviations;

Ab. Abbey; Pr. Priory; C. Aust. Canons of St Austin; Bl. M. Black monks; Wh. C. White Canons; Ben. Benedictines; Gilb. Gilbertines; Præm. Præmonstratenses; Carth. Carthusians; Mon. Monks; Clun. Cluniacks; Cist. Cistercians; T. in the time of; ab. about the year.

Lithes.

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Monasteries.		Order.		Founded.	Value.		
					l	s	d
Berkshire.							
Reading	—	Ben.	—	T. Hen. 1.	1938	14	3
Buffesham Ab.	—	C. Aust.	—	13 Ed. 3.	285	0	0
Abington Ab.	—	Ben.	—	720.	1876	10	9
Bedfordshire.							
Newnham Pr.	—	C. Aust.	—	T. Hen. 1.	293	15	11
Elmeston Ab.	—	Ben.	—	T. W. Conq.	284	12	11
Wardon Ab.	—	Cist.	—	1139.	389	16	6
Chickland Pr.	—	Wh. C. Gilb.	—	T. W. Rufus.	212	3	5
Dunstable Ab.	—	C. Aust.	—	T. Hen. 1.	344	13	3
Wooburn Ab.	—	Cist.	—	T. John.	391	18	2
Buckinghamshire.							
Alhrugg Coll.	—	C. Aust.	—	T. Edw. 1.	416	16	4
Notely Ab.	—	C. Aust.	—	1112.	437	6	8
Miffenden Ab.	—	Ben.	—	1293.	261	14	6
Cambridgeshire.							
Thorney Ab.	— —	Ben.	—	972.	411	12	11
Barewel Pr.	— —	C. Aust.	—	1092.	256	11	10
Cheshire.							
St Werburge Ab.	—	Ben.	—	1095.	1003	5	11
Combermeer Ab.	—	Cist.	—	1134.	225	9	7
Cornwall.							
Bodmin Pr.	—	C. Aust.	—	936.	270	0	11
Launceston Ab.	—	C. Aust.	—	T. W. Conq.	354	0	11
St Germans Ab.	—	C. Aust.	—	T. Ethelstan.	243	8	0
Cumberland.							
Carlisle Pr.	—	C. Aust.	—	T. W. Rufus.	418	3	4
Holme Coltrone Ab.	—	Cist.	—	1135.	427	19	3
Derbyshire.							
Darley Ab.	—	C. Aust.	—	T. Hen. 2.	258	14	5
Devonshire.							
Ford Ab.	—	Cist.	—	1133.	374	10	6
Newnham Ab.	—	Cist.	—	ab. 1246.	227	7	8
Dinkefwell Ab.	—	Cist.	—	1201.	294	18	6
Hertland Ab.	—	C. Aust.	—	T. Hen. 2.	306	3	2
Torre Ab.	—	Præm.	—	T. Ric. 1.	396	0	11
Buckfast Ab.	—	Cist.	—	T. Hen. 2.	466	11	2
Plimpton Ab.	—	Cist.	—	T. Edw. 1.	241	17	9
Tavestock Ab.	—	Ben.	—	961.	902	5	7
Exon Pr.	—	Clun.	—	T. Hen. 1.	502	12	9
Dorsetshire.							
Abbotsbury	—	Ben.	—	ab. 1016.	390	19	2
Middleton Ab.	—	Ben.	—	T. Ethelstan.	538	13	11
Tarrent							

Tithes.

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Monasteries.	Order.	Founded.	Value.		
			l	s	d
Malling Ab. —	Ben. —	By Edmund.	218	4	2
Dertford Ab. —	C. Aust. —	1372. —	380	0	0
Lancashire.					
Whalley Ab. —	Cift. —	1172. —	321	9	1
Leicestershire.					
Leicester Ab. —	C. Aust. —	1143. —	951	14	5
Croxden Ab. —	Præm. —	ab. R. 1.	385	0	10
Launda Ab. —	C. Aust. —	T. W. Rufus.	399	3	3
Lincolnshire.					
Lincoln St Cath. Pr.	Gilb. —	T. Hen. 2.	202	5	0
Kirkstee Ab. —	Cift. —	1139. —	286	2	7
Revelley Ab. —	Cift. —	1142. —	287	2	4
Thornton Ab. —	C. Aust. —	1139. —	594	17	10
Barney Ab. —	Ben. —	712. —	366	6	1
Croyland Ab. —	Ben. —	716. —	1803	15	10
Spalding Ab. —	Ben. —	1052. —	761	8	11
Sempringham Ab.	Gilb. —	1148. —	317	4	1
Epworth Mon. —	Carth. —	1386. —	237	15	2
London and Middlesex.					
St John Jerusalem Pr.	—	1100. —	2385	12	8
St Barth. Smithfield.	C. Aust. —	1102. —	653	15	0
St Mary Bishopsg. Pr.	—	1187. —	478	6	6
Clerkenwel Pr. —	Ben. —	T. Stephen.	262	19	0
London Minors. —	Ben. —	T. Edw. 1. —	318	8	5
Westminster Ab. —	Ben. —	T. Edgar.	3471	0	2
Sion Ab. —	C. Aust. —	By Hen. 5.	1731	8	4
London, a house of.	Carth. —	T. Ed. 3. —	642	0	4
St Clare witht. Aldg. Mon.	—	1292. —	418	8	5
St Mary charter house.	Carth. —	1379. —	736	2	7
St John Holiwell.	Bl. M. —	1318. —	347	1	3
St Mary East Smithf. Ab.	Cift. —	1360. —	602	11	10
Norfolk.					
Thetford Ab. —	Clun. —	1103. —	312	14	4
Wymundham Ab. —	Ben. —	1139. —	211	16	6
Hulmo Ab. —	Ben. —	By Canute.	583	17	0
Westderham Ab. —	Præm. —	T. Hen. 2. —	228	0	0
Walsingham Ab. —	C. Aust. —	ab. T. Stephen.	391	11	6
Castle-acre Ab. —	Clun. —	1090. —	306	11	4
West-acre Ab. —	Clun. —	T. W. Rufus.	260	13	7
Northamptonshire.					
Burg St Peter Ab.	Ben. —	By Rosere king of Mercia.	1721	14	0
Pipewel Ab. —	Cift. —	1143. —	286	11	8

Tithes.

Monasteries.		Order.	Founded.	Value.
				l f d
St Andrews Pr.	—	Clun.	— 1067.	263 7 1
Sulby Ab.	—	Præm.	— T. Stephen.	258 8 5
Nottinghamshire.				
Lenton Pr.	—	Clun.	— T. Hen. 1.	329 5 10
Thurgarton Pr.	—	C. Aust.	— T. Hen. 1.	259 9 4
Welbeck Ab.	—	C. Aust.	— T. Stephen.	249 6 3
Warfop Pr.	—	C. Aust.	—	239 10 5
Bella Valla Pr.	—	Carth.	— ab. 16 Ed. 3.	227 8 0
Newstead Pr.	—	C. Aust.	— T. Edw. 3.	219 18 8

The two last are under value in Dugdale, but thus by Speed.

Northumberland.

Tinmouth, a cell to St Albans, a nunnery. — 511 4 1

Oxfordshire.

Godstow Ab.	—	Ben.	— T. Stephen.	274 5 10
Eynesham Ab.	—	Ben.	— By Ethelred.	441 12 2
Osney Ab.	—	C. Aust.	— T. Hen. 1.	654 10 2
Thame Ab.	—	Cist.	— T. Hen. 1.	256 13 11
Oxford Pr.	—	—	— Bef. Conq.	224 4 8
Dorchester Ab.	—	C. Aust.	— 635.	219 12 0

Shropshire.

Hagmond Ab.	—	C. Aust.	— 1100.	259 13 7
Lillethull Ab.	—	C. Aust.	— By Elfreda, king of Mercia.	229 3 1
Wigmore Ab.	—	C. Aust.	— 1172.	267 2 10
Wenlock Pr.	—	Clun.	— 1181, or before.	401 0 7
Salop Ab.	—	C. Aust.	— 1081.	615 4 3
Hales Owen Ab.	—	Præm.	— T. John.	337 15 6

Somersetshire.

Glaffenbury Ab.	—	Ben.	— About 300.	3311 7 4
Brewton Ab.	—	C. Aust.	— ab. T. Conq.	439 6 8
Henton Pr.	—	Carth.	— T. Hen. 3.	248 19 2
Witham Pr.	—	Carth.	— By Hen. 2.	215 15 0
Taunton Pr.	—	C. Aust.	— T. Hen. 1.	286 8 10
Bath Ab.	—	Ben.	— T. Hen. 3.	617 2 3
Keynesham Ab.	—	C. Aust.	— T. Hen. 1.	419 14 3
Michelney Ab.	—	Ben.	— 740.	447 4 11
Buckland Pr.	—	Cist.	— T. Edw. 1.	223 7 4

Staffordshire.

Dela Cres Ab.	—	Cist.	— 1153.	227 5 0
Burton upon Trent.	—	Ben.	— T. Eadred.	267 14 3
Croxden Ab.	—	Cist.	—	—

Suffolk.

Tithes.

385

Monasteries.	Suffolk.	Order.	Founded.	Value.		
				l	s	d
St Edmundsbury Ab.	Ben.	—	1020.	1659	13	11
Butley Ab.	C. Aust.	—	1171.	318	17	2
Sibeton Ab.	Cift.	—	1150.	250	15	7
Ixworth Pr.	C. Aust.	—	T. W. Conq.	280	9	5
Surrey.						
Merton Pr.	C. Aust.	—	1414.	957	19	5
Shene Pr.	Carth.	—	1414.	777	12	0
Chertsey Ab.	Ben.	—	666.	659	15	8
Newark Pr.	—	—	—	258	11	11
St Mary Overs Ab.	C. Aust.	—	1106.	625	6	6
Bermundsey Ab.	C. Aust.	—	1106.	474	14	4
Suffex.						
Lewes Ab.	Clun.	—	T. W. Ruf.	920	4	6
Roberts-bridge Ab.	Cift.	—	T. Hen. 2.	248	10	6
Battaile Ab.	Bl. M.	—	1066.	987	0	11
Warwickshire.						
Combe Ab.	Cift.	—	T. Steph.	311	15	1
Kenelworth Ab.	C. Aust.	—	T. Hen. 1.	538	19	0
Meryval Ab.	Cift.	—	1148.	254	1	8
Nuneaton Mon.	Ben.	—	T. Hen. 2.	253	14	5
Wiltshire.						
Malmbsbury Ab.	Ben.	—	ab. 670.	803	17	7
Bradenstock Pr.	C. Aust.	—	T. W. Conq.	212	19	3
Edington Pr.	C. Aust.	—	1352.	442	19	7
Ambresbury Ab.	Ben.	—	1177.	494	15	2
Wilton Ab.	Ben.	—	T. Ethelwolf.	601	1	1
Fairly, a cell to Lewes.	Clun.	—	1125.	217	0	4
Laycock Ab.	C. Aust.	—	1232.	203	12	3
Worcestershire.						
Malverne Ab.	Ben.	—	1083.	308	1	3
Evesham Ab.	Ben.	—	T. Offa.	1183	12	9
Perthore Ab.	Cift.	—	—	643	4	5
Hales Owen Ab.	Præm.	—	T. John.	282	13	4
Bordesley Ab.	Cift.	—	1138.	388	1	1
Yorkshire.						
St Mary's, York, Ab.	Ben.	—	1088.	1550	7	0
Selby Ab.	Ben.	—	T. W. Conq.	720	12	10
Kirkstall Ab.	Cift.	—	1147.	329	2	11
De Rupe Ab.	Cift.	—	1147.	224	2	5
Monks Burton Ab.	Clun.	—	ab. 1186.	239	3	6
Nostel Ab.	C. Aust.	—	T. Hen. 1.	492	18	2
Pomfrait Ab.	Clun.	—	T. W. Conq.	237	14	8
Gisbourn Ab.	C. Aust.	—	T. Steph.	628	3	4

Tithes.

Monasteries.	Order.	Founded.	Value.		
			l	s	d
Whitby Ab. ———	Ben. ———	T. W. Conq. —	437	2	9
Montegratiæ Ab. —	Carth. —	ab. 1396. —	323	2	10
Newburge Pr. ———	C. Aust. —	1145. ———	367	8	3
Belland Ab. ———	Cift. ———	1134. ———	238	9	4
Kirkham Ab. ———	C. Aust. —	T. Hen. 1. —	269	5	9
Melfa Ab. ———	Cift. ———	1136. ———	299	6	4
Brilington. ———	C. Aust. —	T. Hen. 1. —	547	6	11
Walton Ab. ———	Gilb. ———	T. Stephen. —	360	16	10
Bolton in Craven. Pr.	C. Aust. —	T. Hen. 1. —	212	3	4
Rival Ab. ———	Cift. ———	1132. ———	278	10	2
Jerval Ab. ———	Cift. ———	T. Stephen. —	234	18	5
Furnes Ab. ———	Cift. ———	1127. ———	805	16	5
De Fontibus. ———	Cift. ———	1132. — —	998	6	8
Warter Pr. ———	C. Aust. —	T. Hen. 1. —	221	3	10
Richal. ———	———	———	351	14	6
Old Maulton Ab. —	———	T. Stephen. —	257	7	0
St Michael near Hull.	Carth. —	1377. — —	231	17	3

In Wales.

Valle de Sancta Cruce in Denbeighshire.	Cift. ———	T. Edw. 1. —	214	3	5
Strata Florida in Cardi- ganshire.	Cift. or Clun.	T. W. Conq. —	1226	6	0

At the time of the dissolution, the religious were discharged from payment of tithes three several ways; either by the pope's bulls, or by their order as aforesaid, or by composition: which discharges would have vanished and expired with the spiritual bodies whereunto they were annexed, if they had not been continued by the special clause abovementioned (as it happened to those which were dissolved by the other statutes of dissolution, for want of such clause). And by the said clause also is created a new discharge, which was not before at the common law, that is, *unity of the possession* of the parsonage and land tithable in the same hand: for if the monastery, at the time of the dissolution, was seised of the lands and rectory, and had paid no tithes within the memory of man for the lands; those lands shall now be exempted from payment of tithe, by a supposed perpetual unity of possession; because the same persons that had the lands, having also the parsonage, they could not pay tithes to themselves. *God. 383. Bob. 241, 248.*

But tho' by such union the persons so possessed were discharged from the payment of tithes, yet the lands were not absolutely discharged of the tithes; for upon any disunion that might happen, the payment of tithes again revived: so that the union only suspended the payment, but was no absolute discharge of the tithes themselves. And therefore such union is not to be pleaded as a discharge from tithes, but only as a discharge from the payment of tithes. *Bob. 248.*

And

And such union must appear to have had these four qualities: First, it must have been *just*; that is, claimed by right, and good and lawful title; and not by disseisin, or other tortious, unjust, or unlawful act: for such an union would not have been a good discharge within the statute. Secondly, it must have been *equal*; that is, there must have been a fee simple both in the lands and in the tithes; as well of the lands upon which the tithes are, as of the parsonage or rectory: for if those religious persons had held but by lease, that had not been such a unity as the statute intended. Thirdly, it must have been *free*; that is, free from the payment of any tithes in any manner: for if the abbots, or their farmers, or their tenants at will or for years, had paid any manner of tithes before the dissolution; it may be alledged as a sufficient bar to avoid the unity pleaded in discharge of tithes. Fourthly, it must have been *perpetual*, time out of mind, that such religious houses were endowed, and such religious persons must have had in their hands both the rectory and the lands united, perpetually, and without interruption, before the memory of man, or (as it seems according to the rule of the common law) before the first year of king Richard the first, discharged of tithes: for if by any records, or ancient deeds, or other legal evidence, it can be made to appear, that either the lands or the rectory came to the abby since the said first year of king Richard the first, such union cannot be said to be perpetual. *Bob. 250.*

And moreover, the lands of such houses dissolved as aforesaid, shall be free from the payment of tithes only so far, as they were free in the hands of the churchmen, namely, whilst they are in the hands and manurance of the owners thereof; and therefore it is necessary for the party who would have the advantage of this privilege, expressly to shew and aver, that the lands are in his hands and manurance: for to say that he is seised of the lands is not sufficient; for he may be seised thereof, and yet another manure them. *Comyns 498. Fox and Bardwell, E. 8 G. 2. Wood b. 2. c. 2.*

It hath been held also, that a tenant in tail, who hath an estate of inheritance, shall be discharged in virtue of the clause aforesaid, so long as he occupies the same himself; but that unity of possession doth not discharge a copyholder (tho' a prior in that case was seised in fee of the manor of which it was parcel, and was also impropriator); much less a tenant for life or years. *Gibbs. 673.* [For in such case, the possession is in the copyholder or other tenant, and not in the landlord or lessor; and consequently it is not a unity of possession.]

But it is otherwise with regard to the king; whose farmers shall be discharged of such tithes, as the spiritual persons were, because the king cannot cultivate the lands himself. And so long as the king hath the freehold, his farmers shall have such privilege: but if after having leased them, he shall sell the same, or shall grant over the reversion; then the farmers shall pay tithes. And it hath been said, that this privilege extends no further than to the king's tenants at will; not to tenants for life or years. *Gibbs. 673. Bob. 282, 3.*

Upon the whole: Not all lands that belonged to the religious houses in general are discharged from tithes; but only such lands are capable of discharge, as belonged to the houses which were dissolved by the statute of the 31 H. 8. And not all those lands which belonged to the religious houses dissolved by that statute are discharged from tithes; but only such of them as were discharged at the time of their dissolution. But what shall be sufficient evidence of such discharge, and of the manner of such discharge, that is, whether by order, bull, composition, or unity of possession, at this distance of time, seemeth difficult to determine with precision; as strictness of proof may be more or less requisite, according to the particular circumstances of the case.

Ancient demesne.

9. *M. 14 C. 2. Compost's case.* It was held, that the king is not by virtue of his prerogative discharged of tithes for ancient demesnes of the crown, but that as persona mixta he is capable of a discharge de non decimando by prescription, as well as a bishop. But if the king alien any of the lands for which he is so discharged of tithes, his patentee shall pay tithes; and not only so, but the prescription is destroyed for ever, altho' the same lands should afterwards come into the king's hands again, by escheat, or otherwise. *Hardr. 315.*

Common appurtenant.

10. In the case of *Lambert and Cumming, M. 1723*; On a bill for tithes in the parish of Warton in the county of Lancaster, it was decreed, that an exemption of an estate from tithes shall extend to a common appurtenant to such estate. *Bunb. 138.*

But in the case of a modus, or customary payment in lieu of tithes, it seemeth, that where commons are divided, inclosed, and improved, the modus can only extend to such tithes as the common yielded before its improvement and dividing into severalties; as of the agistment of cattle, wool and lamb, or such like; and not to the tithes of corn, hay, or other tithes accruing de novo after the improvement.

But where there is a modus in lieu of *all* the tithes of such an estate, it seemeth that such modus shall cover the common appurtenant to such estate when divided into severalties and inclosed: As in the case of *Stockwell and Terry, July 14. 1748*; It was held by lord Hardwicke, where a modus of 131 was paid for Grange farm, to which there was common appurtenant, a parcel of which common was allotted to the said farm under an act of parliament for inclosing the said common, that the modus extended to such new inclosed land.

IV. Of modus's, or exemptions from payment of tithes in kind; and therein of custom and prescription.

Difference between custom and prescription.

1. The difference between custom and prescription is this: *Custom* is that which gives right to a province, county, hundred, city, or town, and is common to all within the respective limits; in pleading of which, it is alledged, that in such a county, or the like, there is and time out of memory hath been such a custom used and approved therein. *Gibbs. 674. Prescrip.*

Prescription is that which gives a right to some particular house, farm, or other thing; in pleading of which it is alledged, that all they whose estate he hath in such land, have time out of mind paid so much yearly, or the like, in full Satisfaction of all tithes arising on those lands.

Gibf. 674.

2. Custom and prescription are either *de non decimando*, or *de modo decimandi*: *De non decimando.*

De non decimando is, to be free from the payment of tithes, without any recompence for the same. Concerning which, the general rule is, that no layman can prescribe in *non decimando*; that is, to be discharged absolutely of the payment of tithes, and to pay nothing in lieu thereof; unless he begin his prescription in a religious or ecclesiastical person, and derive a title to it by act of parliament. But all spiritual and religious persons, as bishops, deans, prebends, parsons, vicars (as heretofore abbots and priors), may prescribe generally in *non decimando*, for they are more favoured than lay persons; for this is still in a spiritual person, and so nothing is taken from the church: for such spiritual person was capable of a grant of tithes at the common law in pernaney. And hence it is that the parson or vicar of one parish, that hath part of his glebe lying in another parish, may prescribe in *non decimando* for it; that is, (as hath been said) to be free from the payment of any manner of tithe for the same. *1 Roll's Abr.* 653.

But this general rule, that none but spiritual persons or corporations may prescribe in *non decimando*, is to be understood with several exceptions; as, first, that the king, as being *mixta persona*, may prescribe *de non decimando*; by the same reason that, as such, he is capable of tithes. *Gibf.* 674.

Secondly, that the lessee, tenant at will, and copyholder of a spiritual person, tho' a layman, shall in this respect enjoy the exemption of the lessor, who is supposed to reap the benefit of it, in reserving so much the greater rents by reason of such exemption. *1 Roll's Abr.* 653. *Deg.* p. 2. c. 16.

Thirdly, that a county, or part of a county, may well plead a custom *de non decimando*, in respect of this or that particular tithe; as hath been pleaded and allowed in the case of tithe milk of ewes, and of tithe of underwood in the wild of Kent and in forty parishes in the wild of Sussex. But a single parish may not prescribe *de non decimando* for particular tithes; nor may any larger district plead a custom absolutely, to have their lands freed from the payment of *all* tithes, without any thing in lieu. And lest this allowance of a custom *de non decimando* to laymen, in any case, should seem to break in upon the general rule, the distinction which hath been laid down is this; that in things tithable by custom only, and not *de jure*, a county or hundred may prescribe in *non decimando* generally, for in that case they are discharged, without a custom to the contrary; so that it is but to insist upon the old right, against which the custom hath not prevailed: but for things which are tithable *de jure*, a county or hundred cannot prescribe in *non decimando*, no more than a particular person; for it would be absurd to say,

say, that a hundred shall prescribe in non decimando, where the particular persons of which it consists cannot so prescribe. 2 *Salk.* 655. *L. Raym.* 187. *Gibb.* 674.

It was long a question undetermined, whether a lay impropiator, as well as a clergyman, be intitled to recover the tithes without proving payment; or, whether a non decimando may be pleaded against a lay impropiator: But in the case of *Benson and Olive*, *T.* 1730, in the exchequer; Pengelly chief baron delivered it as his opinion, that a lay impropiator is under no necessity of proving payment of tithes unto him. *Bunb.* 274.

So in the case of *lady Charlton* against *Sir Blundel Charlton*, in the same court; lord chief baron Reynolds declared it as his opinion, that there can be no prescription in non decimando against a lay rector, any more than against a spiritual rector, and that they are equally intitled to tithes of common right; and that it is sufficient for a lay rector to set forth in a bill that he is seised of the impropriate rectory; and if he maketh out his title to that, it will be sufficient, without putting him to the proof of having received tithes. And to this opinion baron Comyns seemed to assent; but he made a distinction between one who sets up a title to the rectory, and one who intitles himself only to the tithes or any species of tithes within a parish; for in this last case, the plaintiff shall be held to strict proof, not only of his title, but also of the perception of all the tithes he sets up a title to: and, in this present case, the plaintiff having set forth a title in *Sir Francis Charlton* (under whom she claimed) to all the tithes in the parish of *Lucford* (except such small tithes as the vicar usually received) and not to the rectory; and the defendant denying the plaintiff's title to the herbage, and the plaintiff not being able to prove any herbage tithe ever paid, tho' she attempted to prove an unity of possession for above seventy years, yet the bill was dismissed. *Bunb.* 325.

And finally, in the case of the corporation of *Bury* against *Evans*, *T.* 1739, this point seemeth at last to have been settled; wherein it was determined, that there can be no prescription in non decimando, even against a lay impropiator; and that the presumption which ariseth from a constant non-payment will not be sufficient, unless the defendant can shew, either that the lands were parcel of one of the greater abbies dissolved by the 31 *H.* 8. or that some of the impropiators had released the tithes. *Comyns* 643. *Bunb.* 345.

But if a vicar sue for tithes, and the parishioner being a layman denies that the said tithes are due to him; in such case, unless the vicar shall prove that the tithes, in question are due to him by endowment or prescription, he shall fail in his suit: and the reason is, because all tithes de jure or in presumption of law belong to the rector; and therefore the vicar shall receive only those tithes which he enjoyeth by custom or prescription, or by the endowment. 1 *Ought.* 264.

De modo decimandi.

3. Modus decimandi, is thus described by lord Coke: Modus decimandi is, when lands tenements or hereditaments have been given to the parson and his successors, or an annual certain sum or other profit, always, time

time out of mind, to the parson and his successors, in full satisfaction and discharge of all the tithes in kind of such a place. And this may be pleaded by the lord of a manor, for the tithes of his manor; on account of lands of the gift of one who was lord of the manor, and held by the parson and his successors time out of mind: And by a parish or hamlet, for this or that sort of tithe, by reason of lands enjoyed by the parsons time out of mind within such parish or hamlet: And, lastly, by any private person, for his own lands or part thereof, in consideration of a certain sum of money or other recompence. *Gibf. 674. Deg. p. 2. c. 16.*

4. But to make any of these a good custom or prescription, it must have the several qualifications following: As, first, Every modus must be supposed to have had a reasonable commencement; and in every prescription *de modo decimandi*, it is to be intended the rate tithe was the full value of the tithe, at the time of the original composition; for it cannot be presumed, that the bishop, patron, and ordinary would make a composition to the prejudice of the church; and if the modus do not now reach the value, it is to be intended, that either the tithes are improved, or else that money is now become of less value, which makes the present inequality. *Deg. p. 2. c. 16.*

Modus must have a reasonable commencement, as from a real composition.

By *composition real* is meant, where the present incumbent of any church, together with his patron and ordinary, do agree by deed under their hands and seals, or by fine in the king's court, that such lands shall be freed and discharged of the payment of all manner of tithes for ever, paying some annual payment, or doing some other thing, to the ease profit or advantage of the parson or vicar to whom the tithes did belong. And these real compositions have ever been held and allowed here in England, to be a good discharge of the payment of tithes. And from these real compositions it is intended, that all prescriptions *de modo decimandi* first took their rise and beginning; tho' it is to be doubted, that most of them at this day have grown from the negligence and carelessness of the clergy themselves. *Deg. p. 2. c. 20.*

But now, since the statute of the 1 *El.* (in the case of archbishops and bishops), and the statute of the 13 *El.* (in the case of all other ecclesiastical corporations, sole and aggregate), it is agreed on all hands, that no real compositions, any more than alienations, can be made; since all grants are thereby expressly restrained, and made void, which are not according to the tenor of those statutes. And the only modus's that can grow now, must be from the inadvertency of the clergy, acquiescing in the self same agreements from one successor to another. *Gibf. 675, 676.*

Where a real composition hath been made; if the lands discharged thereby be transferred or granted to another, the feoffee or grantee shall have the benefit of it. *Gibf. 675.*

But it is not now necessary to shew, that the modus had at first a reasonable commencement; for these modus's having been from time immemorial, none can know but that there were such circumstances in those ancient times, as might have made such a composition reasonable, tho' at present they may not be discoverable. It is enough to satisfy us at this great distance of time, that the parson patron and ordinary, before the restrictive

restrictive statutes, might bind the revenues of the parson; and that all these modus's must have had their commencement from an instrument signed by the parson patron and ordinary; but there can be no colour to say, that because such instrument in so great a length of time hath been lost, therefore the modus shall be lost also. Indeed so far the law hath gone in favour of the church, as that if the instrument which the parson patron and ordinary had given to a layman, owner of such a farm, to discharge the farm of all tithes (tho' this would be good while the instrument could be shewn) should be once lost; this being a privilege in non decimando, the privilege would be lost by the loss of the deed. 2 P. Will. 573.

Must be something for the parson's benefit.

5. The modus must be something for the benefit and interest of the parson: and therefore, the finding straw for the body of the church, the finding a rope for a bell, the paying five shillings to the parish clerk, the paying a quit rent to the lord of the manor, when these have been urged as discharges from tithes in kind, the modus's have been held not to be good. *Deg. p. 2. c. 16.*

But it is a good modus to be discharged, for that he hath used time out of mind to employ the profits for the reparation of the chancel; for the parson hath a benefit by this. 1 *Roll's Abr.* 650.

Must not be one tithe in lieu of another.

6. The modus must not be, one tithe paid in consideration of another; as, it must not be to pay tithes of other kinds, to be discharged of tithes for dry cattle; it must not be so much for every cow and calf, for the tithe of herbage. *Deg. p. 2. c. 16.*

E. 1729. Fox and others, against Ayde and others. A bill was brought in chancery, to establish a modus, in favour of the inhabitants of the parish of Sturton in Nottinghamshire. The modus was, in consideration that after the grass was cut, the parishioner at his own costs and charges did make the tithe grass into hay, by strowing the grass on the ground (which is called tedding of it), and afterwards gathering it into week and windrows; therefore the persons that inhabited within this parish (which parish appeared to be the greatest part thereof meadow land) were to pay no tithes for the herbage of dry and unprofitable cattle. But tho' it was proved in the cause, that the parishioners time out of mind had paid no tithe of this herbage, yet there was no evidence that this excuse for not paying tithes of herbage was in consideration of the parishioners making the tithe grass into hay. On the other hand it was proved, that foreigners living out of the parish made the tithe grass into hay as well as the inhabitants, and yet paid tithe herbage. And it was proved by the plaintiffs, that the grass was tedded and spread, and not divided into heaps or cocks, until the same was made into hay. By King lord chancellor: 1. This may be a good custom or modus, to excuse the occupier of the same land wherein the parishioner made the grass into hay, from paying tithes for the after herbage; but it can be no good modus, to excuse the herbage tithe of other land: for at that rate, a man might mow and make into hay only a small parcel of ground, containing a quarter or half an acre of land, and by this means be excused from the tithe herbage of a hundred head of cattle. 2. It seems to be a material objection against

against this custom, that foreigners living out of the parish, tho' they have no privilege of being tithe free as to their herbage, yet have made the tithe grafs into hay; which looks as if it was the usage of that parish, for the parishioners to make their grafs into hay of course. 3. It seems material what some of the witnesses have proved, that in this parish the parishioners when they cut down the grafs, did not divide it into ten parts, until such time as they had made it into hay: for of consequence, the parson could not have any opportunity of making his tithe grafs into hay himself. And the bill was ordered to be dismissed with costs; but without prejudice as to any litigation that may be made touching the same at law. 2 P. Will. 520.

7. It must also be something in its kind different from the thing that is due; and therefore a load of hay in lieu of tithe hay, or certain sheaves of corn for all tithes of corn, is not a good prescription: but it hath been said, that this holds only in case the things are de jure titheable, and not by custom only. *Deg. p. 2. c. 2.* Must be different in kind from the thing that is due.

M. 3 An. In the exchequer: *Archbishop of York* against the *duke of Newcastle*. The prescription was, to pay ten fleeces of wool and two lambs in lieu of all tithes. And Price and Bury barons were of opinion that this was an ill modus; because it is one species of tithe for another; and there is great uncertainty, for one fleece may be twice as big, and three times the value of another. But Ward chief baron and Smith baron were of the contrary opinion; for that a modus is nothing but a real composition, for or in lieu of tithes; or an annual profit certain and permanent: and they held, that the payment of any one chattel for tithe was or might be a good modus, as well as money; for why might not the parson originally agree to take ten fleeces for his tithe as well as a penny? They admitted that payment of tithe of one species, or payment of a modus for one species of tithe, could not be a discharge as to another species: but they held, that this was not a payment of tithe, nor a payment for a species of tithe; because it was to be paid at all events, whether there be sheep or no; and they denied the case of 1 Roll's Abr. 651. and held it no more uncertain than to pay a modus of ten cheeses, which may differ vastly both in nature, quantity, and value; and it tends to the disquiet of the country, to break in upon customs and usages, and it ought not to be done but on plain and manifest reason. 2 Salk. 656.

T. 9 G. *Mason*, rector of *Luggershall* in *Bucks*, v. *Holton*. The defendant insisted, that a small meadow had been always enjoyed by the rector, in lieu of the tithe hay of another very large one. It appeared, that the first bore, one year with another, about four loads of hay, the other about 150. The court said, it could never be supposed, that any men in their wits would agree, to take four loads instead of 15. And the modus was set aside as unreasonable.

8. Every modus must be certain; and if it is uncertain, no length of time will make it good. Thus a prescription to pay a penny, or thereabouts, for every acre of arable land, is void for the uncertainty. 2 P. Will. 572. Must be certain.

Thus in the case of *Blacket and Finney*, T. 1725: On a bill to establish a modus, payable on or about the twenty fifth day of April yearly; it was objected to the uncertainty of the time of payment: And the court allowed the objection; but gave the plaintiff liberty to amend, upon paying the costs of the day. *Bunb.* 198.

So also, a modus to pay four shillings for every day's ploughing of wheat, and two shillings for every day's ploughing of barley, hath been adjudged to be ill; it being uncertain how much every day's ploughing was. 2 *P. Will.* 462. 2 *Salk.* 657.

So in the case of *Bean*, vicar of Lydd in Kent, T. 12 *An.* The defendant insisted on a custom to pay 1s in the pound according to the rent, when their land was let to the full value, or at rack rent; when it was not let, or let and a fine taken, then according to the value. After a full debate on both sides, it was decreed to be a void modus. This decree was cited 1 *Geo.* in the case of *Shapter* vicar of St Goram in Cornwall v. *Mitchel*, and allowed of for this reason, that it exposes the parson to be greatly imposed on, who cannot know what rent is reserved, nor what fine is taken; and as to the value of the land, that is still more uncertain.

M. 11 *G. Webber and Taylor.* A bill was brought to establish a modus; which was laid thus: For payment of such a sum of money, while the lands are in the hands of the proprietors; but if in the hands of any other person, to pay tithes in kind, or the money, at the election of the parson. Lord chancellor King said, that he would never establish a modus against a parson, without a trial at law, if he desires it; but this modus is clearly ill, for a modus cannot be defultory. *Cas. Cha. King.* 52.

But in the case of *Chapman and Monson*, H. 1729: A modus that every occupier of land within the parish, living out of the parish, shall pay a penny an acre for all pasture land within the parish, but if he lives within the parish, to pay tithes in kind, was adjudged to be a good modus: and this was said to be the less unreasonable, because the tithes are given as a reward for the trouble and care which the parson takes of the souls of his parishioners, in which case the labourer is worthy of his hire; but then, as the parson is not bound to go out of his parish to visit those who only occupy land within the parish, so it is but reasonable, that they who have not the benefit of the parson's care should answer the less duty to him. 2 *P. Will.* 565.

T. 1733. *Gibb and Goodman.* It was said by Pengelly chief baron, that in an answer to a bill for tithes, it is not absolutely necessary to express the day of payment of a modus insisted on, but this may be supplied by evidence, so as to be a foundation for the court to direct an issue at law to try the modus; but in a cross bill to establish a modus, a day must be expressly alledged, otherwise it will be fatal. *Bunb.* 328.

And many modus's have been set aside, in regard that no day of payment was set forth by the defendant. As in the case of *Whitehall* and *Offley*, T. 5 *G.* Mr Offley had sued Whitehall in the spiritual court for tithes. Whitehall moved for a prohibition, and suggested a modus, but set

set forth no day of payment. For want of which, the court was of opinion it was naught.

E. 8 G. Godard rector of Castle Eaton in Wilts v. *Kable*. The defendant insisted upon several modus's, viz. 3d for a milk cow, 3d for a lamb, 3d for a colt, 1d for a garden, and the like: But they were all set aside, in regard no time for the payment thereof was ascertained by the defendant.

T. 8 G. Woodford vicar of Ebesfame alias Ensom in Surrey, against *Crosse*. Modus, 4d a cow for milk and calf, 2d for a dry beast, 3d for a lamb, and so on, but no day of payment set forth by the defendant: Set aside for the same reason.

Penrice vicar of Dodderhill in Worcestershire, versus *Dugard*. Modus 4l 10s for all small tithes arising on an estate called Impney: Set aside, because no day of payment was set forth by the defendant in his answer.

Pemberton vicar of Belchamp St Paul's in Essex, against *Sparrow* and others. Several modus's set aside for the same reason.

T. 9 G. Corpus Christi v. Vincent. Modus, 1½d for a young milk cow, and 2d for an old milk cow, set aside for the same reason.

And the reason these decrees go upon is, that tithes in kind being a provision made by law for the clergy, which become due at a certain determinate time, and which if not then set forth are immediately demandable, shall not be taken from them by an uncertain payment which becomes due on no determinate day, and which they cannot know when to demand or go about to receive if it be withheld. Besides that such an uncertainty lays a foundation for many disputes; as in the case of the death of an incumbent, where tithes are paid in kind, all tithes severed before his death go to his executor, the rest to his successor; but if a modus to be paid on no certain day should be allowed, no one could determine in that case, whether it should go to the executor of the preceding incumbent, or to the successor.

But it seemeth to be now how held, where an annual modus hath been paid, and no certain day for the payment thereof is limited; that the same shall be due and payable on the last day of the year.

9. A modus must be ancient: And therefore if it is any thing near the present value of the tithe, it will be supposed to be of late commencement, and for that reason will be set aside. As in the case of *Benson* impropiator of Bromley St Leonard, Middlesex, against *Watkins* and others, *H. 3 Geo.* The following modus's, viz. 5s an acre for tithe of winter corn, 4s an acre for summer corn, 2s 6d an acre for upland meadow, and 3s an acre for lowland, were set aside as too big.

So in the case of *Lloyd* vicar of Epping in Essex, against *Small* and others, *4 Geo.* The defendants insisted on several modus's for all small tithes arising out of their respective farms. But it appearing by their answer, that their small tithes in kind, in the year demanded by the bill, did not amount to more in that year than the pretended modus's, the modus's were set aside.

T. 2 G. Franklin v. Jenkins and others. The bill was brought by the parishioners of Farnham in Hampshire against the vicar and tenant of the

impropriator there under the hospital of St Cross, to establish several modus's amongst other things: Some of which were set aside as too big; and among the rest, a pretended modus of 6d for the tithe of a calf.

So in the case of *Layfield* rector of Chiddingfold in Surrey, against *Euknap*: 2 s 6d. for a tithe lamb was some years ago set aside as too big for a modus.

And the reason these decrees go upon is this: That the value of money being much greater at the time when all modus's are presumed to have begun than it is now, a modus near the value of the tithes at this day must have been at that time a great deal more; and it is not to be supposed, that the parishioners would at any time give so much more than the value of their tithes.

Must be durable.

10. A Modus must be something durable; because the tithe in kind is an inheritance certain, and it is against nature that it should be extinguished by a recompence not as durable at least, tho' not so valuable: for this reason, four pence to be paid yearly, by two persons inhabiting two such houses, in consideration of all tithes, hath been adjudged ill; because the houses may decay, or none live in them. *Gibf.* 675.

Must be without interruption.

11. Custom or prescription must be constant, without interruption; and perpetual, from the time whereof the memory of man is not to the contrary: for if there have been frequent interruptions, there can be no custom or prescription obtained. But after a custom or prescription is once duly obtained, a disturbance for ten or twenty years shall not destroy it. *Deg. p. 2. c. 13.*

Modus how destroyed.

12. As every consideration will not make a good modus; so a modus, tho' founded upon good consideration, may be several ways discharged, and tithes become due in kind: As,

(1) Where land is converted to other uses: so, when the prescription is for hay and grass, specially, in so many acres of land; if the land is converted into a hop garden or tillage, the prescription is gone.

(2) By the alteration or destruction of the thing for which the money was paid: as where two fulling mills were under the same roof, and turned into a corn mill; where also there was one pair of stones in a mill, and another pair was added; and where the watercourse was altered by the owner, and the mill was pulled down and re-edified upon it; in all these cases, it was adjudged that the modus was gone. But where a man was seised of eight acres of meadow and one of pasture, for the tithes whereof he had paid time out of mind five shillings and four pence, and afterwards the owner built a corn mill upon the same; it was adjudged that he should pay no tithes for the corn mill, because the land was discharged by the modus. *2 Inst.* 490.

(3) By non-payment of the consideration, or payment of tithes in kind, for so long a time, as to destroy the possibility of making proof that such custom or prescription was: but an interruption for some short time only, will not discharge it; especially if made by the lessee, to the prejudice of the lessor. *Watsf. c. 47. Gibf.* 675.

Modus how to be tried.

13. The rule is, that the modus is to be sued for in the ecclesiastical court, as well as the very tithe; and if it be allowed between the parties, they

they shall proceed there; but if the custom be denied, it must be tried at the common law; and if it be found for the custom, then a consultation must go; otherwise the prohibition standeth. The like is affirmed, in case a jury upon an issue joined in a prohibition upon a *modus decimandi*, find a different *modus*; since a *modus* is found, they shall not have consultation. 2 *Inst.* 490.

The principal reasons why the courts of common law prohibit the spiritual court from trying of *modus*'s, are, that whereas every *modus* is less than the real value, the rule of the canon law is, that less than the real value shall not be taken, and that a custom to the contrary is void; and that the ecclesiastical and temporal laws differ in the times of limitation, forty years or under making a good custom by the ecclesiastical laws, whereas by the temporal laws it must be beyond the time of memory. *Gibf.* 691.

But the spiritual courts have commonly allowed and do allow pleas of *modus decimandi*; and the averment in the prohibition is not that they do take cognizance, but that the plea hath been offered and refused; which supposeth, that if the plea be admitted, the prohibition ought not to go. And accordingly it hath been affirmed by Doderidge and others, that the spiritual court may as well try the *modus*, as the right of tithes, and that a prohibition is not to be granted, till the spiritual court either refuse to admit the plea, or proceed to try it by methods different from the rules of the temporal law, as to the time of limitation, or number of witnesses, or the like. And where lord Coke contended for the contrary doctrine, it was declared by Kelynge and Twisden, in the case of the bishop of *Lincoln* against *Smith*, that in case one libel for a *modus decimandi*, if the spiritual court allow the plea, they may try it. *Gibf.* 691.

But, notwithstanding, it seemeth now to be clearly settled, that if a *modus decimandi* be sued for in the ecclesiastical court, a prohibition lies to stop the trial of it, if the *modus* be denied; and the reason is, not upon the account that the spiritual court wants jurisdiction, but in regard of the notion the temporal law hath of custom, different from the spiritual: And seeing that every *modus* is due by custom, it is the common law only that can determine, what time and usage with us shall be sufficient to create such custom, that is, time beyond all memory to the contrary. Whereas by the spiritual law, sometimes ten years, sometimes twenty, they will adjudge sufficient to create a custom. And prohibitions in such cases are granted, not because the spiritual court hath not jurisdiction of the matter, but in respect of the trial which is to be by the temporal law only; and if upon the trial it be found for the *modus*, the proceedings shall go on in the spiritual court; if against the *modus*, the prohibition shall stand. *Watsf. c.* 56.

But if in the trial of a *modus*, the defendant permits the spiritual court to proceed to sentence, he is then too late to come for a prohibition; because it is only for defect of trial, and not for defect of jurisdiction: but a man is never too late for a prohibition, where it is for defect of jurisdiction. *Bunb.* 17.

V. Of the several particulars tithable.

- I. Corn and other grain, as beans, pease, tares, vetches.
- II. Hay and other like herbs and seeds, as clover, rape, woad, broom, beath, furze.
- III. Agistment or pasturage.
- IV. Wood.
- V. Flax and hemp.
- VI. Madder.
- VII. Hops.
- VIII. Roots and garden herbs and seeds; as turnips, parsley, cabbage, saffron, and such like.
- IX. Fruits of trees, as apples, pears, acorns.
- X. Calves, colts, kids, pigs.
- XI. Wool and lamb.
- XII. Milk and cheese.
- XIII. Deer and conies.
- XIV. Fowl.
- XV. Bees.
- XVI. Mills, fishings, and other personal tithes.

I. Corn and other grain, as beans, pease, tares, vetches.

Corn.

1. **C**ORN is a prædial, great tithe; and is tithable according to the custom of the place; and is commonly tithed by the tenth shock, cock, or sheaf, where the custom of the place is not otherwise. *God. 393.*

Of common right, the owner of the corn ought to cut down and prepare the same, and to make it up into sheaves, cocks, or shocks; and if the owner refuse to do it, the parson may sue him for the same in the spiritual court; but then the suit ought to be special, for not setting them forth in cocks, and not generally for not setting them forth. But having made the corn into sheaves, he is not bound to set it up in heaps, unless the custom of the place oblige him thereunto. *Watf. c. 49.*

If a prescription be, to pay certain sheaves of corn for all tithes of corn, this is no good prescription; for the parishioner ought to make it into sheaves; and therefore part of his duty in kind, cannot be in satisfaction of the residue. *Watf. c. 49.*

If the custom of the place be, to measure forth to the parson the tenth part of the corn whilst growing upon the land; it seemeth that this manner of tithing ought to be observed; or if the custom be, that the parson ought

ought to have for his tithe of corn, the tenth land of corn, beginning at such land as is next to the church, this custom is good: but when in such case the parishioners by covin, to defraud the parson, did not manure and sow such lands (the corn of which would by the custom be to the parson) so sufficiently as their other lands, and the parson therefore did sue in the spiritual court generally for the tenth sheaf and shock, and a prohibition was awarded because it was said that the parson might have his remedy at the common law for the fraud; yet afterwards in the same case a consultation was granted, Wray chief justice saying, that this custom was against common reason. *Watsf. c. 49. 2 P. Will. 569.*

If the custom be, that if the odd sheaves or shocks, under the number of ten, shall not be tithed, by reason that they set up the tithes in heaps or shocks, which of common right the owner of the corn is not bound to do; the owner is not bound to divide the said sheaves or shocks, and set forth the tenth thereof, for that such custom upon such consideration is good. *Watsf. c. 49.*

2. Tithes are not to be paid (lord Coke says) for the herbage of meres Balks and or balks in corn fields; but the same are freed thereof by the common meres. law and custom of the realm. *2 Inst. 652.*

3. So, it is said, no tithes shall be paid for hay which groweth upon Headlands. headlands, where the horses and plough turn when the land is ploughed, if there be alledged a custom not to pay this, and also it be averred that the headland is only sufficient to turn the plough. *1 Roll's Abr. 646.*

4. So, if a man pay tithes of corn, it is said, he shall not pay any Stubble. tithes for the stubble which groweth the same year upon that land, tho' the same be cut for thatch or other uses. *2 Inst. 652. 1 Roll's Abr. 640.*

[Nevertheless, altho' the law is so delivered, in this and other like instances; yet it is certain, the stubble, as also the aftereatage, and the like, are as much a part of the increase, as the corn or hay. And therefore perhaps these general assertions may require some limitation or restriction.]

5. For ordinary rakings of stubble, not voluntarily scattered, no tithes Rakings. shall be paid:

But for rakings voluntarily scattered, and upon collusion, a man shall pay tithes. *1 Roll's Abr. 645. 2 Inst. 652.*

6. If a man pay tithes of corn, he shall not pay any tithes for the After-eatage. after pasture of that land for that same year, nor for agistment in such after grafs. *1 Roll's Abr. 641.*

But if, after the crop is taken off, the land shall be sown with turneps; he shall pay tithes of such turneps: for that is a new increase. *Bunb. 314. Viner. Dimes. Z.*

7. Fallow ground pays no tithes for those years wherein it lies fallow, Fallow nor is the pasture thereof tithable, unless it be kept lay beyond the ground. course of husbandry: for if land lie fallow every two or three years, the same is a charge to the owner and tenant for that time, and an advantage to the person in the bettering of his crop the year following, when the same is sowed with corn or grain. And therefore altho' the
grafs

grass and feeding of the fallow ground for that year be some small profit to the owner of the soil, yet he shall not pay tithe for the same. *1 Roll's Abr.* 642, 649.

Tares cut to
feed cattle.

8. A prescription may be within a parish, that by reason they have not sufficient meadow for milch kine and draught cattle, they have used to cut some of their tares green, and give them to the aforesaid stock, and to be discharged of tithes for the same: and this is a good custom and consideration, for that the parson hath an advantage thereby as well as the parishioner, namely, in the tithe milk, and manuring of the other corn land; and the matter is, the want of meadow and pasture; and the surmise is as if it had been said, that for want of meadow and pasture, they have used to eat their meadows with their plow cattle, and for so much as they did eat to pay no tithes. *Watf. c. 49. Bunb. 279.*

So if a man, according to the custom of the country, doth sow his land to feed his horses for tillage, and the use hath been to suffer the horses to be fed upon the land without any mowing of the grain; the parson shall not have any tithes thereof, because it is no more than pasture for his horses. *Watf. c. 49.*

Beans and
pease.

9. If a man gather green pease to spend in his house, and there spend them in his family, no tithes shall be paid for the same; but if he gather them to sell, or to feed hogs, there tithes shall be paid for them. *1 Roll's Abr.* 647. *Deg. p. 2. c. 3.*

It hath been disputed, whether the tithe of beans and pease, gathered by the hand, and sold for man's food, is a great or small tithe. As in the case of *Sims*, vicar of Eastham in Essex, against *Bennet* and *Johnson*, occupiers of lands within the said parish, and *Wilkes* and *Hitch*, improPRIATORS of the rectory of the said parish; *Dec. 6. 1762.* Mr *Sims*, the vicar, brought his bill in chancery in the year 1756, setting forth, that by the endowment of the vicarage he is intitled to the tithes of gardens and curtilages, and all sorts of tithes, except the tithes of sheaves and hay and mills [*præter decimas garbarum et feni et molendinorum ad ventum*]; that the defendants *Bennet* and *Johnson*, holding several parcels of land in the said parish, did in the same year cultivate several pieces of such land with beans and pease, of such sort as are generally used for the food of man, which they gathered in the months of June, July, and August, by the hand in the field, by plucking them from the stalk whilst green, and sent the same to market, and sold them for the food of man accordingly; and insisting, that by the gathering beans and pease by the hand, so cultivated as aforesaid, he the said *Sims*, as vicar, by virtue of the said endowment, became intitled to the tithe thereof, and that no tithe ought to be paid for the same to the improPRIATOR, nor ought beans and pease so cultivated and gathered by the hand, by plucking from the stalk whilst green, to be considered as part of the tithes appropriated to the rectory. To this bill the defendants put in their answers. And the defendant *Bennet* said, that in the year 1756, he sowed thirteen acres or thereabouts with pease and beans, in the open fields in the said parish, and believed that in June, July, and August in the same year, he gathered ten acres and a half or thereabouts of the same by the hand in the field, by plucking

ing them from the stalk whilst they were green, and sold them in a cart by retail by pecks and smaller quantities, in and about the parish of Eastham, and in the streets of London, and the remainder of such pease and beans were gathered into the barn and threshed. And the defendant Johnson said, that he sowed five acres of beans and pease in like manner, and part thereof he plucked by the hand when green, and sold the same in London streets and at market, and gathered and threshed the remainder in the barn. And both the said defendants said, that all their ground in the said parish, sowed with pease and beans in the said year, was ploughed for that purpose, and no part thereof was dug with a spade except under or near the hedges, where the same could not be ploughed, or in such places as were too wet to be ploughed; and that the tithe of all beans and pease, whether gathered green or otherwise, having been always paid to the rector, and esteemed to belong to him, they had therefore compounded with the impropiators for the same, and hoped they should not be compelled to account also with the vicar for the same tithes. The defendants Wilkes and Hitch, in their answer, insisted on their right as impropiators. Witnesses were examined on both sides. Several of whom deposed, that such pease and beans as are used for the food of man, had been cultivated in the fields and grounds of the parish of Eastham, only for about thirty years past, and were cultivated and gathered green off the stem, as usually done in a garden (save only that in the field the plough hath been generally used and in the garden the spade), and in rows, but in a different manner from those planted and sowed in fields in the common course of husbandry for provender and not for man's food. And one of the witnesses, Mr. Wyat, vicar of the parish of Westham (adjoining to that of Eastham), said, that in the year 1753, he commenced a suit in chancery against the impropiator and others of his said parish for such tithes, and that the then lord chancellor decreed in his favour, and he hath enjoyed the said tithes ever since. On hearing, the lord keeper Henley decreed, Nov. 10. 1760. that the vicar's bill should be dismissed, without costs. Upon this, Mr Sims appealed to the house of lords, setting forth the following reasons. 1. It is admitted by the respondents, that if the tithe of beans and pease, cultivated in a garden-like manner, and gathered by hand whilst green, is a *small* tithe, the same is not included in the exception out of the vicar's endowment. Many arguments may be offered to prove it such. The quality of all tithes is to be determined at the time of severance, when the right accrues. The same thing which produces a great tithe in one state and mode of culture, produces a small tithe in another. If clover is cut for hay, it is considered as a great tithe; when suffered to grow for seed, it is considered as a small tithe. This is also the case of tares; when cut green, they are referred to the class of small tithes; when matured and dried before cut, they are referred to the class of great tithes. The tithe in question is certainly not a tithe of corn or grain; and it bears two marks of a small tithe; the one, that it is in the nature of a garden tithe, being distinguished out of the description, not by difference of culture, but merely by the locality of setting beans and pease in fields; the other,

Tithes.

that it is a new and modern culture. 2. Supposing the tithe in question to be a *great* tithe; still the vicar was intended to be endowed with it, because it is not included in the exception out of his endowment. Pease and beans plucked by the hand, whilst green, from the stem, however cultivated, or wherever planted, can never be tithed under the description of *decimæ garbarum*. Spelman in his glossary interprets *garba* to be *fasciculus* either of fruits or wood. Du Fresne calls it *spicarum manipulus*. And Matthew of Westminster saith, *frumenti manipulus quem patriæ lingua dicimus sheaf, gallice vero garbam*. But the tithe in question cannot fall under the meaning of the word *garba*, being set out and taken by a measure totally different. 3. It doth not seem an objection of weight to the appellant's demand, that if tithes are paid to the vicar for pease and beans gathered green, another tithe will be claimed by the rector, when the stalks ripen and are cut down, by which means a double tithe is said to be payable for the same thing. This will appear otherwise, when the matter is considered not in the light of paying two tithes for one thing, but of dividing the same tithe between two different owners, according to the grant of appropriation. The vicar will have his tithe of what is actually gathered green, and the rector of what is left, after it shall be cut down. 4. It is submitted to be an objection of as little weight as the objection just answered, namely, that in consequence of the appellant's reasoning, the farmer will have it in his power to determine the property of tithes between rector and vicar, from the manner or place of culture, or time of gathering. But this is a contingency, which attends this sort of right; the occupier being allowed by law to cultivate his lands, as he and the landlord shall think proper; which makes tithes in their own nature, a fluctuating and uncertain inheritance. — On the other hand, the respondents hope the decree will be affirmed, for these (amongst other) reasons. 1. Because a vicar cannot claim tithes of any kind but by endowment, or by usage (which is only evidence of an endowment). In this case, there is no evidence of usage; and therefore if the vicar is not intitled to the tithes in question under the endowment, he is not intitled at all. But, 2. By the endowment, the tithes in question are excepted out of the grant to the vicar; for the words *decimæ garbarum*, in the exception, have been always considered as technical terms, appropriated to, and descriptive of great tithes, and to distinguish them from small tithes. And *garba* in its signification comprehends pease and beans growing in fields, as well as all other sorts of corn and grain growing in fields. So that pease and beans are in their own nature a great tithe, and excepted out of the vicar's endowment in this case, under the name of *garbæ*. 3. As to the objection, that in the present case, the pease and beans being plucked green, and sold for the food of man, they are applied to the same use as beans and pease growing in gardens, which are a small tithe; and that this tithe ought to take its denomination from the use the thing tithable is applied to, and therefore is a small or vicarial tithe, and not within the meaning of *decimæ garbarum*: It is answered, that all the cases relative to tithes, taken together, serve to prove, that the law denominates and adjudges tithes to be great or small, according to the nature of

of the thing, and not from the mode of cultivation, or use to which the thing is applied. And therefore in this case, the application of the pease and beans in question for the food of man, they not being nor falling under the denomination of tithes of gardens, technically called *decimæ hortorum*, ought not to convert the tithes in question into small tithes. — And, after a full hearing, Dec. 6th and 7th, 1762, the lords affirmed the decree.

II. Hay, and other like herbs and seeds; as clover, rape, woad, broom, beath, furze.

1. By a constitution of archbishop Winchelsea, it is ordained, that *the Hay. tithes of hay wheresoever it groweth, whether in large meadows or small, or in the highways, shall be demanded and (as is expedient) shall be paid to the church.*

In the highways] In chiminis: But in a constitution of Gray archbishop of York, from which this constitution is taken and in a great measure copied, it is *in chevifis*, in the fore-acres, or heads of the ploughed land; (altho' the common law, as it hath been said, will not admit of this.) *Johnf. Winch.*

It hath been resolved, that if a man cut grafs, and before it be made into hay, but only put into swathes, he carrieth and giveth it to his plough cattle for their necessary sustenance, not having sufficient for their sustenance otherwise; no tithes shall be paid thereof. *1 Roll's Abr. 645. Bunb. 279.*

But in the case of *Webb and Warner, M. 2 Ja.* when the inhabitants of divers marshes and fenny lands, who used to gather a rough hay, called fenny fodder, for want of sufficient grafs to sustain their beasts in winter, alledged that they did this for the sustenance of their beasts and the better increase of their husbandry, and ought therefore to be freed from the payment of tithes; the court held, that this surmise was not sufficient, for one may not prescribe in non decimando; and in that it is alledged they bestow it upon their cattle there, that is not any cause of discharge; for so they may prescribe for corn spent in their family, or for corn given for provender to their cattle; whereby no tithes should be paid. *Cro. Ja. 47.*

Hay is a prædial, great tithe; and is to be tithed in swathes, windrows, or cocks, as the custom of the place is. *God. 412.*

Of common right, it seemeth that grafs is tithable when it is put into grafs cocks, and not before; for that then the tenth may be severed from the nine parts. *Watf. c. 49.*

In the case of *Fox and Ayde, E. 1729*, in the chancery; it was objected, that the parishioners de jure ought to make their tithe grafs into hay. But the lord chancellor King declared the law to be otherwise, and interrupted the counsel when they began to speak to this, saying that all which the parishioners were bound to do was, to cut down the grafs and divide it into ten parts, after which the parson was to make it into hay;

and that this had been so resolved in a Devonshire case (the case of one *Reynolds*.) 2 P. Will. 520.

Yet in the notes upon the said case, by the editor, it is observed, that it is called the tithes of hay, and not of grafs: and so is the aforesaid constitution.

But whatever the owner is obliged to do of common right, the custom of every place is to be observed; and therefore, if the custom be to measure out the tenth part of the grafs standing for the tithe thereof, and that the parson shall cut and make it, this is good. And in this and all other cases, when the tithe of the grafs is set forth, and the owner is not bound to make the parson's tithe into hay; the parson de jure may make the grafs into hay upon the land on which it grew, altho' the usage time out of mind hath been to the contrary: And it is needless for the parson to alledge a custom for the doing of it. *Watf. c. 49.*

The finding straw for the body of the church, is no discharge from tithe hay, because it is no advantage to the parson, who is not charged with the repairs of the church. *Cro. Eliz. 276.*

But a meadow in the parish, of which the parson and his predecessors had been seised time out of mind, was judged a good consideration for the parishioners to be discharged of tithe hay; for it shall be intended, that it was originally given on that account. 1 *Roll's Abr. 649.*

Aftermowth. 2. Rolle says, that of after mowth, that is, the second mowth, tithes shall be paid de jure, without a special prescription to be discharged by payment of the tithes out of the first mowth, and then it shall be discharged. 1 *Roll's Abr. 640.*

But Sir Simon Degge says, that tithes are not to be paid of the aftermaths of meadows: But if the meadowing be so rich that there are two crops of hay got in one year, there the parson shall have tithe as well of the latter as of the former crop. *Deg. p. 2. c. 3.*

But if the occupier of the land can prescribe, that in consideration the owner doth make the first tuncure into good and sufficient hay, and set it forth in cocks sufficiently dried, then he shall be discharged of the tithes of the aftermowth; this is a good prescription and discharge, by reason of the labour and costs he bestowed in making the first tuncure into hay. *Bob. 46, 47.*

Or if the prescription be, to be discharged of the tithe of the aftermowth, only upon consideration that they have used time out of mind to cut down the grafs of the first mowth, and the same to tedd and shake abroad, and the same grafs so dispersed and cast abroad to gather into weaks and windrows, and put it into small cocks at their own costs; this is sufficient, tho' it be not made into perfect hay. *Cro. Ja. 42.*

And in the case of *Norton and Brigs, T. 9 W.* it was said by Treby chief justice, that tithes are not payable for aftermowth de jure; and therefore it is but form to lay a custom to be discharged of tithes of aftermowth, in consideration of making the former mowing into hay; for tithes are payable only of things renewing once in the year. *L. Raym. 242.*

[But

[But it is to be observed, that this was extrajudicial, being not relative to the matter there in question. And this rule, as hath been intimated before, is not universally true.]

3. If a man pay tithes of hay, it is said, that no tithes ought to be paid de jure afterwards for the pasture of the same land for the same year; for he shall not pay tithes twice in a year for the same thing: for the after pasture is only the reliicks of the hay of which he hath paid tithes before. 2 *Inst.* 652. 1 *Roll's Abr.* 640. After-eatage.

Nor for agistments in such after grafs. 1 *Roll's Abr.* 640. *Bunb.* 1, 7.

But this is to be understood, where no more grafs is left by the scythe than is usual; for if more grafs than usual is fraudulently left, the case is otherwise. *Bob.* 48.

If an innkeeper pay tithes of hay of certain land, and the rest of the year afterwards putteth into the same land the horses of his guests which come to market there in the same town; it is said, no tithes shall be paid for the herbage of those horses, for this is only the afterpasture of the land, whereof he hath before paid tithes. 1 *Roll's Abr.* 641.

4. Dr Watson says, the tithes of clover grafs shall go to him that hath the tithe hay. *Watf. c.* 39. Clover.

And in the case of *Franklyn* and the master and brethren of *St Cross*, T. 1721; the vicar being endowed of tithe hay, it was decreed, that he was thereby intitled to clover, faint foin, and rye grafs; which are species of hay that is the genus. *Bimb.* 79.

But the seed of clover is in its nature a small tithe. *Watf. c.* 49.

Thus in the case of *Wallis* against *Pain* and *Underbill*, H. 1738, a bill was exhibited in the exchequer by the plaintiff *Wallis*, who was tenant or farmer under the impropiator of the great tithes in the parish of *Prittlewell* in *Kent*, and insisted that the defendant *Pain* sowed a field with clover which was cut for hay, and that he let the aftermath grow for seed which was cut and threshed for seed, of which the plaintiff ought to have the tithe as a great tithe. The defendant *Pain* insisted, that he had paid to the plaintiff for the tithe hay of his clover; and that the aftermath of clover stood for seed, which was a small tithe, and payable to the vicar. And Mr *Underbill*, the vicar, insisted upon the tithe of clover seed as a vicarial or small tithe. By the depositions of several witnesses it appeared, that the difference between clover cut for hay, and that cut for seed, is considerable; when made into hay, it is cut while the grafs is green, and fit for cattle to eat; when cut for seed, it stands till the stalk is good for little or nothing, and the seed is the only thing of value or regarded. It was argued for the plaintiff, that clover seed is in the nature of it a great tithe, and therefore due to the plaintiff; for as tithe hay is due to him, the seed of that hay must of consequence belong to him also; that where the parson is intitled to tithe hay, he will be intitled to the hay made of clover, as well as of other grafs; and if to the hay, likewise to the seed. On the other side it was insisted, that clover seed is in its nature a small tithe; that the tithe of no seed was ever looked on as a great tithe; and as to what was said that the stalk and seed should go together, it is frequent that the seed or fruit of trees

goes to the vicar, when the tree goes to the parson: wood is always reckoned a great tithe, and goes to the rector, unless the vicar be specially endowed with it; but acorns, as well as the fruits of all other trees, were always held as small tithes. Lord chief baron Comyns delivered the resolution of the court: That by the canon law, as long as the distinction hath been made between great and small tithes, which is as ancient as appropriations to the religious houses, who usually engrossed the great tithes, but left the small tithes to the curate, all seeds have been reckoned as small tithes. The common law seems to follow the canon law in this point. And all the resolutions, relating to tithes which proceed from things newly introduced into England, have held them to be small tithes; as saffron, woad, flax, hops, tobacco. As to clover seed, there doth not appear to have been any express determination in this point: But it is a seed; and all seeds are mentioned as small tithes. It is true, that clover grass made into hay is of the nature of all other grass made into hay, and consequently must belong to the parson, or other who is intitled to tithe hay; but it does not follow, when it stands for feed, and is not made into hay, that the seed may not be small tithes. Rape seed, caraway seed, turnip seed, mustard seed are small tithes; but if the herb be growing with other grass and made into hay, it would be great tithe. And all the barons agreed in opinion, that the plaintiff's bill should be dismissed. Baron Parker seemed to doubt, as it partook of the nature of the stalk, from whence it was taken. *Comyns* 633.

And it hath been decreed, since this case, that the seed of clover is a small tithe. *Bunb.* 344.

A modus may extend to clover, altho' of late only brought into England; if the modus be such as covers all tithes of hay. *Bunb.* 20.

Rape seed.

5. Rape seed, is a small tithe. It has not been sown many years in large quantities in this country. And I do not find or know of any judicial determination concerning this particular species of tithe. The method of cultivation of rape seed is this: It is sown in August or September; and suffered to grow till the seed is quite ripe; and then it is cut down, with the greatest care, and if possible in calm weather, with sickles, lest any of the seed should drop from the pods, and be lost upon the ground. And for the same reason it is never bound up in sheaves, or made into hattocks: but, as soon as may be, it is gathered upon a large cloth, brought into the field for the purpose; and upon such cloth is threshed and dressed; and then the seed is removed out of the field in sacks or bags. The ripeness of the seed when proper for cutting, and the smallness of it, renders this method of cultivation absolutely necessary; for if it was to be bound up in sheaves, or gathered into heaps, and then removed in carriages or otherwise out of the field to be threshed and dressed, a great part of the seed would be shaken and lost, which would not only be a damage to the owner, but also to the land, for the shaken seed would grow again, and spoil the future crop of grain.

It is usual for the occupier of the land to agree with the owner of the tithe, for the tithe of rape seed at so much an acre.

It never has been determined, in what manner the tithe of rape seed shall be set out by the occupier of the land, where he does not agree to pay a composition for it. But the better opinion seems to be, that it should be set out by measure in the field, after it is threshed and dressed; as, from the manner of its cultivation, the owner of the tithe cannot sooner remove it from the land; and as he has no right to enter upon the land for any other purpose than to take away his tithe, which in this case is not capable of being taken away before it is threshed and dressed.

6. Woad, growing in the nature of an herb, the tithe thereof is a Woad. small tithe: as was agreed by all the justices, in the case of *Udal* and *Tindal*, *H. 1 Car.* *Cro. Car.* 28.

7. No tithes shall be paid of fearn. *2 Inst.* 652.

Fern.

8. It is said, that for heath, furze, and broom, tithe shall be paid; unless the party set forth a prescription or special custom, that time out of mind there hath been paid milk, calves, or other tithes, for the cattle that have been kept upon the same lands; in which case they shall not pay tithes. *God.* 413. *Gibf.* 680.

Heath, furze, broom.

Also if they be burned in the owner's house kept for husbandry within the parish, they may be discharged. *Wood b. 2. c. 2.* *Bob.* 53. But otherwise if sold. *Bob.* 53.

So in the case of *Roffe* and *Harding*, *M. 12 An.* It was admitted, that no tithes are due for furze spent upon the premisses; but for furze cut into faggots and sold, it was decreed by the lord chancellor Harcourt, that tithes should be paid. *Vin. Dismes.* 7. 31.

III. Agistment or pasturage.

1. Agistment is the feeding of cattle upon pasture lands, which pay Agistment, no other tithes; and is so called from the french *geyser*, *gister*, [jacere] to what lie; because the beasts are levant and couchant, that is, lying and rising. So *agister* in a forest, in an old version of the charta de foresta is called *gyst-taker*. *4 Inst.* 293. *Ken. Par. Ant. Gloss.*

2. Tithe of agistment of cattle is due of common right; because the Agistment due grafs which is eaten is de jure tithable, and must have paid tithe if cut de jure. when full grown. *L. Raym.* 137. *2 Salk.* 655. *2 Inst.* 651.

3. Concerning which, the general rule is, that it is to be paid for For what beasts agisted for hire; or for dry or barren cattle, that do otherwise cattle. yield no profit to the parson: and not for cattle which are nourished for the plough or pail, and so employed in the same parish; because the parson hath tithe for them in another kind. *2 Inst.* 652. *Deg. p. 2. c. 5.*

But if a foreigner that lives in another parish depastures ground with cattle bred for the plough and pail, to be employed in a foreign parish; he shall pay tithe for the agistment of such cattle. *Deg. p. 2. c. 5.* *L. Raym.* 129.

Also if the same cattle are turned off to be fatted, and are grazed, there tithes of agistment shall be paid; since they are no way beneficial to the parson in any other tithes. And so of cows after they are become barren, and are fatted for sale. *Gibf.* 676.

The

The like is to be said of horses; that while they are kept for the use of husbandry, no tithe shall be paid: but if horses be kept for sale, or to carry coals, or for the like offices which are profitable to the owner, and not profitable to the parson, tithe shall be paid for them. *Gibf.* 676.

But saddle horses shall pay no tithes, no more than cattle for the plough and pail, or cattle killed for the use of a man's own family; in respect of the profit that otherwise accrues to the parson from these. *Bunb.* 3. *1 Roll's Abr.* 641.

But if they be horses of travellers or others taken in as guest horses; it is agreed by all, that tithe of agistment is due, because no profit otherwise accrues to the parson from them. *Gibf.* 682.

In the case of *Thorp* and *Bendlowes*, in the exchequer, *T.* 1762. *Thorp*, as rector of *Houghton* in the county of *Durham*, filed his bill against *Bendlowes* (amongst other things) for the tithe agistment of his coach horses, suggesting that the horses were not kept for pleasure only, but that the defendant made a profit of them, by employing them to fetch his coals at ten miles distance out of the parish, and in leading manure, bricks, and wood from the parish of *Houghton* to the defendant's lands in the parish of *Darlington*, which is the next adjoining parish. Which fact was proved in the cause. The defendant by his answer insisted, that the horses were kept for his coach, and for pleasure only, and were not liable to pay any tithe for agistment as barren and unprofitable cattle. The court were unanimously of opinion, that coach horses were liable to pay tithe of agistment, and decreed the defendant to account for the same, and to pay the plaintiff his costs.

Not two tithes
in the same
year.

4. If a man pay tithes in kind to the parson, for his lambs, fleeces, and other things, going and arising upon his pastures, wastes, or other lands; it is said, that he shall not afterwards in the same year pay tithes of agistment for the same pastures, wastes, or other lands. *1 Roll's Abr.* 641.

But in the case of *Coleman* and *Barker*, *E.* 1726; where the suit was for the tithe of agistment of sheep which were depastured on turnips remaining on the ground unsevered, it appeared that the defendant had paid tithe wool, and after shearing time fed his sheep with turnips, by which they were bettered five shillings a sheep; and tithes were decreed for the depasturing of those sheep. *Gilb.* 231.

And the like was decreed in the case of *Swinfen* and *Digby*, *H.* 1731. *Bunb.* 314. For in such case, the sheep being turned off to be fatted, cease to be profitable to the parson in any other way.

By whom to
be paid.

5. The tithes for depasturing unprofitable cattle ought to be paid by the occupier of the ground, and not by the owner of the cattle. *Bunb.* 3.

For if the occupier of the ground were not in such case made liable, it would be greatly inconvenient for the parson to sue every owner of the beasts; and perhaps it would be hard to be known, and infinite. *1 Roll's Abr.* 656. *Deg. p. 2. c. 5.*

But if it is a common that is depastured, the owner of the cattle (if known) must pay the tithes, and not the owner of the soil; because the owner of the soil hath no profit by it. *Bunb.* 3.

6. As

6. As to the manner of paying tithe for agistment, where no special custom is, if it be paid for guest cattle taken in, it is said, that the tenth part of the money received is payable for agistment; if for the owner's cattle, then the tithe shall be according to the value of the land, after the rate of two shillings in the pound: for that they cannot otherwise be valued, or accounted for, because the profits of the lands for which they are paid, are received by the mouths of the beasts. *Watf. c. 50.*

But this way of estimation, according to the value, is only for convenience; for the tenth part of the produce, and not a sum of money, is undoubtedly due de jure.

But by custom, or prescription, such tithes may be paid in other manner, as by the acre, and for all manner of cattle together, or the like. *Watf. c. 50. Bunb. 1.*

Where profitable and unprofitable cattle feed together, tithe shall be paid in kind for the profitable, and agistment for the unprofitable. *Gibf. 677.*

7. In the case of *Smith and Roocliff, H. 1717*; the barons were of opinion, that a modus of one shilling in the pound for pasture, according to the value of the land, was a void modus; as is also a modus of one shilling in the pound, according to the value of the rent. *Bunb. 20.*

And the like was adjudged in the case of *Harrison and Sharp, T. 1724.* The same being no other than payment of a part for the whole. *id. 174.*

IV. Wood.

1. In the case of *Hicks and Woodson, H. 8 & 9 W.* it is said, that wood is not de jure tithable, because it doth not renew annually; and that therefore in libels in the spiritual court for wood, they alledge a custom. Altho' it was said, that the practice of the spiritual court at this day is otherwise: but the court did not regard that; for Holt chief justice said, that they made stones, gravel, and all things tithable. *L. Raym. 137. 2 Salk. 656.*

And prescriptions of non decimando for tithe wood have often been allowed; particularly in the wilds of Kent and of Suffex: which seemeth to suppose that it is not due of common right, but only by custom. *Gibf. 686.*

But in the case of *Jordan against Colley and others, E. 1720*: On a bill by the rector for tithe wood in the parish of Little Wenlocke in the county of Salop, as it had been time out of mind paid in that parish, against the defendants, as vendees of Sir William Forrester; the defendants in their answer say, that no tithe hath been paid for this coppice wood called Holebrook coppice, when felled before, and that they never heard that any tithe or modus had been paid for wood in that parish. It was insisted upon for the defendants, that tithe wood was not due of common right, and therefore that the proof lay upon the plaintiff, and that it was only founded upon a canon in bishop Stratford's time, and therefore that the defendants need not alledge any prescription or custom by way of exemption: But it was answered for the plaintiff, that occu-

piers must always set forth an exemption. And by the court, The defendants ought to have shewn some exemption; and there is no instance, that a parish can prescribe in non decimando for tithe wood; wilds and hundreds are upon another consideration. — But note, says the reporter, altho' the court decreed against the defendants, yet it doth not seem to have been yet certainly determined, that tithe wood is due of common right. *Bunb. 61.*

But in the case of *Boulton and Hurstler*, T. 2 G. 2. The plaintiff having libelled in the spiritual court for the tithe of *sylva cædua*, the defendant moved the court of king's bench for a prohibition: And the suggestion was, that they were timber trees, and of twenty years growth. It was urged further, that the court might grant a prohibition even upon the face of the libel, because the demand is set forth generally, and therefore must be intended that this tithe is due of common right; whereas the right of tithe wood is only by custom. And that was the reason given in the case of *Hicks and Woodson*, why a hundred may prescribe in a non decimando of tithe wood; for as by custom it grows due, by custom it may be made not due. But the court said, that this reason indeed was laid down by the judges of this court in that case; but they said, this has never been allowed for law by any of the other judges of Westminster hall. And it certainly is not law: for tithe is as much due of *sylva cædua* by the law of England, as any other tithe whatsoever. And judge Reynolds said, this may evidently be shewn not to be the reason of this law in relation to hundreds; for if it was, the same reason would prove that every private man may prescribe in a non decimando of this nature. And for this reason, and also because the defendant in the spiritual court had not alledged in his plea there that the trees were of twenty years growth, a prohibition was denied. 1 *Barnard. 71.*

Whether it is
a great or
small tithe.

2. That wood is a prædial tithe is plain; but whether great or small, hath been a question between the parsons and vicars; and it hath been resolved, that if a vicar be only endowed with the small tithes, and have by reason thereof always had tithe wood, in such case it shall be accounted a small tithe, otherwise it is to be accounted amongst the great tithes. *Deg. p. 2. c. 1.* — But this doth not alter the quality of the tithe: and the vicar's having received it, may be evidence of a grant thereof having been made subsequent to the endowment, altho' such original grant is now lost; but is not evidence that wood in it self is a small tithe.

Tithe of *sylva*
cædua by the
canon law.

3. By a constitution of archbishop *Winchelsea*; Tithes shall be paid of trees, if they be sold: Which *Lindwood* explains of large trees, which bear no fruit, and being cut down are not fit for timber, but are used for fuel. *Lind. 200.*

And by a constitution of archbishop *Stratford*: Forasmuch as divers persons do refuse to pay tithes, which are notoriously due, of their *sylva cædua*, and of the wood thereof being felled, which things do not require so much labour as the fruits of the ground; and think that they lawfully refuse the same, because they have not paid tithes thereof in times past; and withal do render it doubtful what shall be deemed *sylva cædua*: We do therefore declare that *sylva cædua* is that, which of whatsoever kind

kind of trees it is, is kept on purpose and is mature and fit to be cut down, and which being cut down springs again from the stump or roots; and that the tithe ought to be paid thereof as a real and prædial tithe; and that the possessors of such woods shall by all manner of ecclesiastical censures be compelled to pay the tithe thereof when cut down, as of hay and corn. *Lind.* 190.

4. But by the statute of the 45 *Ed.* 3. c. 3. it is enacted as followeth: By the statute At the complaint of the great men and the commons, shewing by their law. petition, that whereas they sell their great wood of the age of twenty years, or of greater age, to merchants to their own profit, or in aid of the king in his wars, parsons and vicars of holy church do implead and draw the said merchants in the spiritual court for the tithes of the said wood in the name of this word called *sylva-cædua*, whereby they cannot sell their woods to the very value, to the great damage of them and of the realm; it is ordained and established, that a prohibition in this case shall be granted, and upon the same an attachment, as it hath been used before this time.

5. The wood intended in this statute, is such as is fit for building of houses and ships; and therefore without doubt it comprehends oak, elm, and ash; but it hath also been adjudged to include beech as timber, in Buckinghamshire and some other counties, where better timber is not to be had, or is very scarce. And those trees are free, not only as to the trunk or timber, but also as to the bark, root, and germens that grew upon the ancient stock; and it is not material, how oft or how seldom the branches thereof are lopped, because being once free they are always free. *2 Inst.* 643.

And it hath been also resolved, that oak under twenty years, being fit for timber in time to come, shall not pay tithe; and that tho' it stands till it is rotten, and unfit not only for timber, but for all manner of uses, except the fire, it shall be privileged, upon this general maxim, that once discharged and always discharged. *1 Roll's Abr.* 640.

But in the case of *Buckle and Vanacre*, 1692. Upon a bill for tithe wood in Erith in Kent, above twenty years growth, part used for timber, and part made into billets and faggots; it was resolved, that the last shall pay tithes: for the trees being above twenty year's growth alone will not privilege them, but the use. And the same resolution was in the case of *Acton and Smith*, which was reheard and reviewed; and of *Franklin and Jones*, in the year 1694; and also in the case of *Cowper and Layfield*. *Bunb.* 99.

And in the case of *Greenaway* and the earl of *Kent*, *H.* 1704; timber trees above twenty years growth, cut and corded for fuel, and the bark stripped from the same, were adjudged to pay tithes, as well as underwood; but that no tithe was due for such wood above twenty years growth, nor of the bark thereof, which was not corded. *Bunb.* 98.

But, finally, in the case of *Walton* and lady *Mary Tryon*, Dec. 15. 1751. The plaintiff brought his bill, as rector of Micham in Surry, for the tithe of the tops and lops of old pollard oaks, ashes, and elms; and of the tops, lops, and bodies of beeches. — Mr Wilbraham argued

for the plaintiff: The tithe of wood is certainly payable; and the law as to this is now pretty certain. The 45 *Ed.* 3. is an explanatory law; and all lops and tops are tithable if the tree be under 20 years growth. Before the statute of *fylva cædua*, all were tithable; but by that law it is declared that all timber trees should be exempt: And the reason is plain; for timber trees yield but one profit, and that but once in a century; and therefore as it was so long before the owner had a profit, that wood was exempt. But even by this act it was not meant that the whole tree was exempt; the body only, not the tops and lops were so. Since this act, the courts have gone so far, as to exempt all parts of the tree: and even germins from these trees have also been determined to be exempt. After this, the courts endeavoured to bring it to some rule; and the buyers were always to pay the tithes. Afterwards, the courts held, that trees not converted to the use of timber were tithable; and on this some cases have been determined. As the case of *Man and Somerton*, 1 *Brownl.* 94. So the case of *Hawes and Cornwall*, 1 *Lev.* 189. where it is said, that wood for firewood, tho' of 25 years growth, shall pay tithe when felled. So in the case of *Rapley and Lloyd*, all wood for burning was held tithable. In the case of *Briggs and Martin*, *T.* 6 *W.* a bill was brought by the plaintiff, as lessee of the rectory of Bromley in Kent, for tithe wood made into bavings: The defendants by their answer insisted, that old pollards and dotards paid no tithe; but notwithstanding this, the court decreed an account and satisfaction to the plaintiff for them. The courts seem to have gone a step further. They have had regard to the use made of the wood, and not to the age of the pollard; namely, what was used for timber, and what for firewood; the former was held to be exempt, the latter to pay tithes. And agreeable to this was the case of *Greenaway* and the earl of *Kent*, before the lord chief baron *Ward*. The bill was brought by the plaintiff as vicar of Walford in Herefordshire. The defendant insisted, that no tithes were due of such wood as was above twenty years growth. A cross bill was brought. And on hearing the court declared, that the plaintiff was intitled to the tithe of all wood above 20 years growth as well as under, which was corded, but not otherwise. But it may be objected, shall tithes be so uncertain, as to be determined by the use of them? I answer, that in many cases, tithes must depend upon the use of them. As in wood, if it is made into bavings for firing, it is tithable; if to make fences, it is not so. So if one fats cattle on land, agistment is due for them; so if he keeps cattle as barren, tithes are paid: but cattle kept for the plough are exempt, and even those reared for the plough are exempt. These are all established cases, and do not want any confirmation. The case of *Brook and Rogers*, *Moor* 908. is very express, that if timber is lopped before 20 years growth, tithes shall be paid of the loppings. And if these trees in question have been constantly cut, and tithes have been paid of them without any contradiction (as is now in proof), why is not this an evidence that these trees were cut before 20 years growth, and so out of the statute of *fylva cædua*? And this presumption may more naturally arise in this case, for the falls here happen but once in 16 or 20 years; and

and one of the plaintiff's witnesses speaks to tithes being paid of these trees 45 years ago without any molestation whatsoever; and there is not one witness produced for the defendant, who will venture to swear, that ever one load of timber was cut without paying tithes: And if that be the case, the natural presumption is, that this wood is tithable; for it has paid tithes, as long as memory can go back. As to the *beech*; if it be timber, as insisted upon by the defendant, then it comes within the statute of *sylva cædua*: And this matter must be tried, if the parties think it worth their while to dispute it. — By Mr Solicitor General for the defendant: The question now put is, Whether the tops and lops cut from trees above 20 years growth are liable to pay tithe if cut in order to be used as fuel. And this is a question of a very extraordinary nature indeed, and contrary to both old and modern law. For no point was ever laid down more clearly, from the time of Edward the third to the present time, than this, that tops and lops of trees above 20 years growth are always exempt: And the reason is, when once it is privileged, it always remains so. The case in *Moor* 908, cited for the plaintiff, is expressly for the defendant; for that particularly states, that if not cut within the 20 years, then it is exempt. And so have been abundance of other cases. And how can the right of the parson arise from the *use* of the thing? How is it possible for the parson to know the owner's intent? The right therefore ought to commence from the time it is cut and severed. The earl of *Kent*'s case does not prove the present distinction. For that proves, that the trees themselves were in question; and nothing at all was said of the lops and tops. Besides, they were not pollards or dotards, but young oaks. This proves that all trees cut down and used for fire would be liable to tithes. But this proves too much. But there is a note on the back of Mr Browne's brief in that cause (which I have), that settles what this case was: He says, there was positive evidence, that the trees corded had grown from stems of old wood, and was formerly coppice wood; and this will alter the case greatly. The case of *Layfield* and *Cowper*, T. 1698, was on a bill for tithes of lops and tops of timber trees; the defendant insisted, that they were the product of beech and ash trees; he admitted, he did convert them to fuel and cordwood; but, in regard that they were above 20 years growth, insisted, that they were exempt: By the decree, an account was directed for wood in general; and exceptions were taken to the remembrancer's report, that he had taken no notice that these beeches were some 30, some 50 years growth, and were timber, and therefore exempt; and of that opinion was the court. In the case of *Bibey* and *Huxley*, H. 1724, the bill was for tithe of coppice and other wood: The defendant insisted, that he had felled several timber trees of twenty years and upwards, and had dug up several roots, and made them into stacks, and made the tops into faggots; some were used for repairs, others for fuel; and as these were all above the age of 20 years, the body with all the rest are exempt from paying tithes by law: And it was decreed, that the plaintiff should have an account of the tithe wood; except for the tithe of oak, ash, and maiden trees of beech proceeding from stools above 20 years growth: The application
therefore

therefore to *fuel*, does not make the difference. But it is objected, that it must be presumed these trees now in question were cut before 20 years growth; and therefore never had the privilege: But as that is not charged by the bill, it cannot be presumed. As to the beech, if insisted on, it must be tried. — By the lord chancellor Hardwicke: The tithes demanded by the bill are of two sorts; first, tops and lops of old pollard oaks, ashes, and elms; secondly, beech trees, both body and branches. The principal question arises on the tops and lops of old pollard oaks, and the rest. There is no difference in point of fact. It is admitted on both sides, that there is no coppice wood in this ground; that they are ancient pollards: and as to the beeches, that they are of 20 years growth and upwards, and the greatest part of them was cut and made into billets, and sold for fire, except a small part of them which was used for posts and rails. The plaintiff has proved, that at two former falls, tithes were set out and taken of this wood, the one in 1712, the other in 1728. On the other hand, the defendant has not proved any fall when tithe was not paid; but has proved, that in these two falls the family lived in Northamptonshire, and knew nothing of their being set out and taken, and that no other wood in the parish does pay tithe, or ever had paid. The plaintiff has found this; namely, the *use* and application of the things of which tithes are demanded: But tho' this be the general right set forth in the bill; yet if any other right appears, the plaintiff will be intitled to an account. This is a question of very great consequence, both to the owners of wood, and to the clergy also; and has been argued both from *reason* and *authorities*. And upon the *reason* of the thing, it has been said, that there is no more reason why tithes should not be paid of wood, than of any other product of the earth, for it *annuatim renovat*: But this proves too much; for according to this reasoning, all wood in general would be liable; and tho' this does *annuatim crescere*, yet it does not *annuatim renovare*; at common law coppice wood is subject to tithes, tho' it does not *annuatim renovare*; yet in its nature it ought to pay; for it is cut under a certain course of years, and is looked upon as an ordinary stated renewal, like the case of saffron; but of timber trees the stated rule is otherwise, there the law does not wait for a stated course of felling. It was further reasoned for the plaintiff, that the lops and tops of pollards are tenancy profits: But this is no rule of tithes; and varies in different counties; and would make the affair of tithes very uncertain; and in many places, the lops of spiral trees are allowed to tenants for fire wood, and yet such lops are not tithable. It was further said to be reasonable, that the *use* and application should determine whether the thing was tithable or not; that as a coppice is liable, so it is reasonable that any other wood, not timber, but used for fuel, should be so too: But this goes to the question put in issue by the bill, and I am afraid would be a very dangerous innovation; the subsequent use of the thing, as it does not alter the nature, cannot give a tithable quality which it had not before; if it could, why not *vice versa*, that is to say, if wood not timber should be applied to the use of timber, why should not such use exempt it from the payment of tithes? This

was

was never heard of, yet it is equally reasonable. It is said, there are certain cases, where the use and application of the thing shall make it tithable; and there will appear no greater uncertainty in one case than in the other; as for instance, wood cut to be burned in the house of a parishioner, this was said to be not tithable; but that is not true, unless by custom; for it was otherwise determined in the case of *Norton and Farmer*, *Cro. Cha.* 113. It was said also, that cattle for the plough and pail are not tithable; so there the use determines: But this is not a prædial, but a mixt tithe, which the parishioner is not obliged to set out at a particular place or time; and the parson receives it in another manner, by taking the tenth part of the profits. In many cases it is impossible to say, to what uses the wood may be applied: the owner may sell it standing, the buyer to cut it; and if so, how is the intention to be known? and in many counties where timber is very plentiful, there it is often cut down and used as fuel; and if the use and application was to prevail, it would make two different common laws of tithe, and this without any custom. The law for tithes of wood is a positive law; to wit, that of all timber trees of 20 years growth or upwards, whether timber by law or custom, no tithe is to be paid, either of bodies, lops, or tops. It has been much controverted, whether the statute of *sylva cædua* is a new law or only declaratory of the common law: the latter is now the settled opinion; for the words of the statute are, *it has been used of old*. In the statute the wood is particularly mentioned, and its age and growth; but not one word is said of the use: and the opinion of all the courts upon the construction of this statute has been, that where the tree is timber, by law or custom, of 20 years growth or upwards, it is exempt. And in 2 *Inst.* 642, 643. the rules are very particularly laid down. These rules have not been contradicted, except in the case of germins that came from old stools, and which is the case of most coppices in England. But it is asked, what difference is there, if germins grow from trees intirely cut down, or from trees that have been lopped? I answer, that the difference is great; for in the case of germins that come from stools, no tree remains from whence the privilege is derived; but in the case of lops and tops the tree remains, and so does the privilege. I come now to consider the cases cited against this doctrine by the counsel for the plaintiff. The case of *Man and Somerton*, 1 *Brownl.* 94. is not applicable to the present case. The case of *Hawes and Cornwall*, 1 *Lev.* 189. is this: "Wood cut for firing, tho' above 20 years growth, shall pay tithes; and so pollards, if above 50 years": But this is very short and imperfectly stated, and is not supported by law at all; and by a report of the same case in 1 *Sid.* it is said, that the wood was coppice wood; and by the determination, most probably it was so, and therefore proves nothing for the plaintiff. But it is said, there is no difference between pollards and underwood, for pollards are not timber: but I answer, that pollards having gained this privilege, always retain it; and the bodies of pollards may serve to many uses as timber doth; and if dotard trees are privileged, much more ought pollards. The next case cited was that of *Brigs and Martin*; which was on a bill for lops and tops of old pollard and dotard trees;

trees; and an account was accordingly directed: But on what this was founded, does not appear, nor whether these pollards were under the time of privilege or not; and what makes this case the more extraordinary is, the decree in the case of *Northley* and *Colbe* in the very next term, and it is directly contrary; and the only way of reconciling these two cases is, that in the first case it must have appeared that the pollards were cut before 20 years growth. *Greenaway* and the earl of *Kent*, was the next case, and most principally relied on; and the ground of this decree was, that all wood, even above 20 years, that was cut and corded, should be tithable; and goes further than any case before or since: But the lord chief baron Ward in that case was of a quite different opinion, and made a learned argument against the decree; but the other three barons differed from him; therefore, I observe, this was not a uniform authority; and I think the chief baron Ward's was the best opinion: baron Price's reasons in that cause do not satisfy me at all; when he was considering the statute of *sylva cædua*, he said, that ancient statutes must be construed according to the intent, and not literally; and that *great wood* does not in its strict sense mean trees of this sort, but such wood as is applicable to large buildings; which is in effect to say, that a tree which in its nature is timber, yet if it is not large, and is applied to firing, shall be tithable: another ground that he went upon was, the statutes relating to the rules of felling of wood, but these are rules laid down only for the preservation of timber, and cannot be applicable to tithes that are demanded of them: and upon the whole, this determination is directly contrary to all the other authorities; for there is a *tempus constitutum*, and that cannot be departed from; and I will say further, that there has been no precedent since to follow it; for as to that case of *Bibey* and *Huxley*, that is rather against it. If these trees now in question, were lopped and made pollards before 20 years growth, and so have continued to be lopped, then they will be liable to tithes: But this is a question of fact proper to be tried, being too much for me to determine upon the evidence now laid before the court: I am rather inclined to think that they were not, for the plaintiff himself in his bill has stated them to be ancient pollards and large. The second question relates to the tithe of *beeches*, both bodies and branches: And it is not disputed, but that this wood is above 20 years growth: And then the matter of fact must be tried, whether it is timber by the custom of the country: And if so, it will be exempt; otherwise it must pay tithes.

But only of
wood not fit
for timber.

6. For of wood not fit for timber, tithes shall be paid. As of hazel, birch, willow, whitethorn, holly, alder, maple, asp, hornbeam, and such other like trees of base and inferior nature, and unfit for building; of these tithes shall be paid, tho' they be above twenty years growth. 1 *Roll's Abr.* 640.

Yet the scarcity of other timber (as hath been said) and custom of the country to put such trees to the uses of good timber, may free them being of twenty years growth or under, from payment of tithes; as hath particularly been adjudged of asp, cherry tree, and other like trees in Buckinghamshire: so, of willows in the county of Southampton.

7. And

7. And if a man cut down a coppice wood, and thereof pay his tithes, and afterwards before any new branches spring out, he grubbeth up the roots and stubbs of the wood, he shall not pay tithes thereof, for that they are parcel of the frank tenement, and not annually renewing. No tithe of the roots of trees.
1 Roll's Abr. 637.

8. Also trees cut only for mounds, plough gear, hedging, fencing, fuel, maintenance of the plough or pail, are not tithable. Nor of wood for husbandry or fuel. *2 Inst. 655.*

But this is to be alledged, not absolutely, that by the law of the land wood so applied shall not pay tithe; but *sub modo*, that is, that the parson hath some consideration for it, or at least that the house is for maintenance of husbandry, by reason of which the parson hath more plentiful tithes. By which rule, if a man hath an house of husbandry with lands, and demising the lands, reserveth the house, tithe of firewood is payable. *Gibf. 686.*

9. For osiers employed in hurdles for sheep, no tithe shall be paid. Nor for hurdles of sheep. *Gibf. 684.*

10. If wood be cut to make hop poles, and so employed, no tithes are due, where the parson or vicar hath tithe hops. Nor for hop poles. *Bunb. 20.*

11. If a man cut down wood, and burneth it to make brick for the reparation of his house within the parish, for the habitation of himself and his family; no tithes shall be paid for this, inasmuch as the parson hath the benefit of the labour of his family. For making bricks. *1 Roll's Abr. 645.*

But if a man cut down wood, and burn it to make bricks for the enlargement of his house within the parish, more than is necessary for his family, as for his pleasure and delight, he shall pay tithes for this. Accordingly, where the plaintiff in prohibition had affirmed, that he burned it for the reparation and enlargement of his house, generally, without saying for the necessary habitation of his family, a consultation was awarded; for the court said, that by this surmise he might build a castle, and yet pay no tithes. *1 Roll's Abr. 645.*

12. If a man pay tithes for the fruits of trees, and afterwards cut down the same trees, and maketh them into billets or faggots, and selleth them; he shall not pay tithes for the billets or faggots, for that this is not a new increase. Fruit trees. *2 Inst. 621. 1 Roll's Abr. 641.*

13. Concerning nurseries, or trees transplanted, it hath been resolved, that where the owner dug them up, and made profit of them, and sold them in another parish, tithe should be paid thereof: and if the owner sells them, and pulls them up himself, the owner shall pay the tithes; but if he sell them particularly to another, the vendee shall pay the tithes. 3 H.—Nurseries. *Gibf. 683, 684. God. 431.*

14. When wood is titheable, it is set out while standing, by the tenth acre, pole, or perch; or when cut down, by the tenth faggot, or billet, as the custom hath been. In what manner to be paid. *Wood b. 2. c. 2.* Or, if there be no custom, then the general rule seemeth to be, so soon as the tenth can be severed from the nine parts.

Where a wood is cut, consisting of the loppings of great trees and of underwood, and the proportion on one side or the other side is so small, as not to quit the charge of separating; it is said, that the whole shall

pay tithe or be discharged, according as the greatest part is tithable or not tithable. *Gibf.* 667.

But this can only be an argument of convenience; and cannot in any respect alter the nature of the tithe.

By whom to
be paid.

15. Of underwoods fold standing, the tithe shall be paid, not by the feller, but by the buyer. *God.* 455. *Deg.* p. 2. c. 4.

But if a man sell wood to another, and the vendee burneth it in his house; in this case, it is said, that the vendor shall be charged for the tithes, and not the vendee; for that no tithes are due for wood burned in one's house. By the civil law, it is said, that the parson hath election to sue either of them; but this is against the common law. *1 Roll's Abr.* 656.

[In short, the matter seemeth to be plainly this: That he shall pay tithe, to whom the other nine parts belong when the tithe become due.]

Modus.

16. A prescription by one, to pay but three farthings for the tithe of all willows cut down by him in such a parish, was declared to be ill; because if he cut down all the willows of other men too, only three farthings should be paid for all: but to have prescribed for all willows cut down upon his own land, would have been good. *Godb.* 60.

It is a custom in some places, to give an hearth penny for estovers burnt; by which they are free from the tithe of wood burnt for fuel. *Bob.* 57.

V. Flax and hemp.

Flax hath been adjudged to be a small tithe; and so to continue, notwithstanding its being sown in large fields. *Gibf.* 680.

Concerning which, by the 11 & 12 W. c. 16. it is enacted as followeth: Whereas the sowing of hemp and flax is and would be exceeding beneficial to England, by reason of the multitude of people that are and would be employed in the manufacturing of those two materials, and therefore do justly deserve great encouragement; and whereas the manner of tithing hemp and flax is exceeding difficult, creating thereby chargeable and vexatious suits and animosities, between parsons vicars impropiators and their parishioners; for remedying whereof, it is enacted, that every person who shall sow any hemp or flax, shall pay to the parson vicar or impropiator yearly the sum of five shillings and no more, for each acre of hemp and flax so sown, before the same be carried off the ground, and so proportionably for more or less ground so sown: for the recovery of which sum or sums, the parson vicar or impropiator shall have the common and usual remedy allowed of by the laws of this land. s. 1.

Provided, that this shall not extend to charge any lands discharged by any modus decimandi, ancient composition, or otherwise discharged of tithes by law. s. 2.

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VI. *Madder.*

By the same rule, that the tithe which proceeds from things newly introduced into England hath been adjudged to be a small tithe, the tithe of madder may be deemed also a small tithe.

Concerning which, it is enacted by the 31 G. 2. c. 12. (which is in force for fourteen years) as followeth: Whereas madder is an ingredient essentially necessary in dying and in callicoe printing, and of great consequence to the trade and manufactures of this kingdom, and may be raised therein equal in goodness, if not superior, to any foreign madder; therefore, for the encouragement of the growth thereof, it is enacted, that every person who shall plant grow raise or cultivate any madder, shall pay to the parson vicar curate or impropriator of the parish or place, the sum of five shillings an acre and no more, and so proportionably, in lieu of all manner of tithe of madder; for the recovery whereof, the parson vicar or impropriator shall have the common and usual remedy allowed of by the laws of this realm. f. 1.

Provided, that no madder shall be carried off the ground on which it grows, before payment of the said sum herein directed in lieu of tithes. f. 2.

Provided also, that this shall not extend to charge any lands discharged by any modus decimandi, ancient composition, or other discharge of tithes by law. f. 3.

VII. *Hops.*

Hops pay a prædial tithe; and regulary are accounted among small tithes. *God.* 414.

Thus in the case of *Franklyn* and the master and brethren of *St Cross*, T. 1721; the vicar being endowed of small tithes, it was decreed, that he was thereby intitled to hops, being a small tithe, tho' of growth since the endowment. *Bunb.* 79.

Tithes of hops are not to be paid till after they are picked, and before they are dried; every tenth measure. *Bunb.* 20.

In a late case, *Mr Chandler*, planter at Maidstone in Kent, having set forth the tithe of his hops by the tenth pole unpicked, *Mr Bliss* the impropriator brought this matter before the court of exchequer; where after long debate of counsel on both sides, and reading three former decrees, the court again declared this method of setting forth to be illegal.

And, finally, in the case of *Walton* and *Tyers*, May 17, 1753. *Mr Tyers*, having planted a considerable number of acres with hops in the parishes of Mickleham and Darking in Surrey, of both which parishes *Mr Walton* was incumbent, offered to pay to him after the rate of 20l an acre for the tithe thereof; which *Mr Walton* refused. Whereupon *Mr Tyers* gave him notice, that on such a day he would begin to gather his hops, and would regularly set out every tenth hill thro' all his hop plantations as the tithe thereof, by severing the bind of the hops from

the foil, and leaving the same on the poles; and that he would in the same manner daily set out the tithe of his hops, in order that Mr Walton's agent might be present at the respective times of setting out the tithe, and might carry away the same in due time. Mr Walton said, that this method of tithing was new and contrary to law, and that he would not take the tithe in that manner; but that he expected the whole crop should be gathered, and afterwards measured in baskets, and that every tenth basket of hops, after being so measured, should be set out for the tithe thereof. This Mr Tyers refused to do, and proceeded according to his notice to set out the tithe in the manner abovementioned; leaving every tenth hill ungathered, having cut or severed from the foil the binds or stems on which the hops on every such tenth hill grew; and renewed his notice daily whilst his hop gathering continued. Mr Walton did not meddle with the tithe so set out; and after the hops had continued for some months upon the poles on every tenth hill as aforesaid ungathered, and so became spoiled and rotted, Mr Tyers brought an action for damages against Mr Walton, forasmuch as he was thereby hindered from dressing and cultivating his hop plantations. Upon this, Mr Walton filed his bill in the exchequer against Mr Tyers, thereby insisting, that the manner in which Mr Tyers had set out the tithe of his hops, by leaving the hops on every tenth hill, and severing the binds from the foil, was not a proper method for setting out such tithes; but that the tithe of hops ought by law to be set out after the same are picked from the bind or stem. And, on hearing, the court declared, that the method of tithing hops insisted on by the defendant in his answer, is not a good setting out of the tithe of hops; but that hops ought to be picked and gathered from the binds, before they are tithable. Mr Tyers appealed to the house of lords; setting forth, that the manner of setting out the tithes by the admeasurement of the hops in baskets, would be very prejudicial and inconvenient to both parties, as the hops by that means would be necessarily bruised, the flower and condition thereof hurt, and the hops thereby very much damaged; that it hath been usual of late years, for hop planters to direct their gatherers to pick or assort their hops into different pokes, according to their different degrees of fineness and colour, to wit, the *fine*, and the *brown*; and such assortment is the most material and expensive part of the manufacturing of hops, thrice as much time and expence being required in picking and assorting hops into two different parcels, as is necessary in picking them into one poke when first gathered; and that it is unreasonable, that persons claiming tithes should have the benefit of this part of the manufacture of hops, which costs about 5l an acre, without making any allowance, or contributing any share to the expence; and praying relief, for these (amongst other reasons): First, There is no positive law, to regulate the manner of tithing hops; neither is it fixed by immemorial usage or custom; the determinations of courts relating thereto have been various; and therefore that manner of tithing seems most just and equitable, which is both the least prejudicial to the owner, and most beneficial to the parson or impropiator.

Secondly,

Secondly, The manner insisted on by the respondent, by picking and then setting out the tithes by admeasurement in baskets, is so very detrimental to the planter, that it must inevitably be the ruin of the plantation of hops, the cultivation whereof is of extensive benefit to this kingdom: The method insisted on by the appellant is undeniably fair and equitable, not liable to any fraud whatsoever; whereas the method insisted on by the respondent is avowedly oppressive and injurious, in no wise productive of any benefit, or preventive of any fraud.——Mr Walton, the respondent, hoped the decree would be affirmed, (amongst other reasons) for these following: First, the setting out the tithe of hops by measure, after they are picked from the bind or stem, is the fairest and most equal method, and liable to the least inconvenience; whereas the method of tithing contended for by the appellant, by every tenth hill, would be liable to great fraud, inasmuch as the planter of hops would have a right to set out for tithe every tenth hill to be computed from the place he began at, and he might any year determine before he manured his hop ground where he would begin to set out the tithe, and thereby would certainly know every tenth hill thro' the whole plantation, and might neglect to manure or improve them so much as the other hills, which would be unjust and unreasonable. Secondly, The method of tithing contended for by the appellant, would give occasion to many disputes and controversies; as the hops growing on one hill are apt naturally to intermix with the hops growing on the hills adjoining, so that it is scarce possible to sever the one from the other intire; and the owner of tithes, or his agents, or servants, exercising the right of entring into the hop grounds, and pulling up the planter's poles, must frequently furnish matter for suits and vexations; which would be inconvenient both to the owner of the tithes and the parishioners. Thirdly, The appellant hath not made the least proof, that the tithe of hops was ever set out before they were picked from the bind or stem, or that they were tithed by the tenth hill (which is the method of tithing he contends for); but on the contrary, in many instances, where the method of setting out the tithe hops has been disputed or brought in question, it has been uniformly determined and adjudged, after solemn argument, that the tithe of hops by law ought to be set out by measure, after they are picked from the bind or stem.——And the decree was affirmed by the lords.

There can be no *modus* for tithe hops, because the court will take notice, that hops have not been ancient, but used in beer of late times only, being first introduced into England about the year 1524. Yet a prescription to pay so much in lieu of all small tithes, may include hops and other such small things which have come in use of late years. *Wals.* c. 49. *Bunb.* 20.

VIII. Roots and garden herbs and seeds; as turnips, parsley, cabbage, saffron, and such like.

Out of gardens is paid tithe of all garden herbs and plants; as parsley, sage, cabbage, turnips, saffron, and the like: Which are small tithes, and may be demanded in kind. *Bunb.* 10.

So *potatoes* are a small tithe; and consequently due to the vicar, where he is endowed of the small tithes: and when gathered, the tenth part must be set out.

So also *turnips*; which, when pulled, ought to pay tithes, tho' never so often sowed, and tho' upon the same land. As in the case of *Benson* impropiator of Bromley St Leonard, Middlesex, against *Watkins* and others, *H.* 3 G. The court declared the tithe of turnips to be due toties quoties, tho' severed never so often in the same year.

M. 6 G. *Crow* tenant under the church of Rochester of the tithes in the hamlet of Modingham in the parish of Chippinghurst in Kent, against *Stoddart*. The court declared the tithe of turnips sowed after corn, and eaten by unprofitable cattle, to be due; tho' it was urged to be an improvement of the land, and that the parson has the benefit of it the next year.

T. 9 G. *Harwood* vicar of Erith in Kent, against *Railston*. The court declared tithe to be due of turnips sowed after corn in the same year, and fed upon on the land by barren cattle.

So in the case of *Swinfen* land *Digby*, *H.* 1731; it was declared by the court, that where land is sown with turnips after the corn is cleared, and fed with sheep and barren cattle, tithes shall be paid of such turnips; altho in this case it was insisted upon for the defendant, that the soil in that county, to wit, in Staffordshire, is dry and sandy, and that this method of husbandry improveth the land, so that the plaintiff had thereby better tithes of corn, and had before received the tithes of lambs and wool of the sheep so fed: But the court over-ruled this defence, and said it amounted to a non decimando as to turnips. *Bunb.* 314.

That is to say, if the cattle are fed upon the turnips unsevered from the ground, an agistment tithe shall be paid for such cattle: But if the turnips are severed from the ground, then the tithe in kind of such turnips shall be due from the severance.

If *tobacco* be planted here, the tithes thereof are small tithes. *Godb.* 366.

Saffron also is tithable, tho' gathered but once in three years. *Wood* b. 2. c. 2.

And it is a prædial small tithe: for where the parson had the great tithes, and the vicar the small, and a land which had been sown with corn was sown with saffron, the tithe was adjudged to the vicar as a small tithe, notwithstanding the statute of the 2 *Ed.* 6. c. 13. that tithes shall be paid in such manner as they have been for forty years past. *Gibb.* 685.

Most

Most commonly, a certain consideration in money is paid in lieu of the tithes of gardens, either by custom, or by agreement with the parson. If the custom be a parochial custom, or extending to gardens throughout the parish; the enlargement of a garden doth not make tithe due in specie: but otherwise, if it is a special prescription for this or that garden. And the same thing is to be said of orchards. Accordingly, in the forementioned case of *Franklyn* and the master and brethren of *St Cross*, it was decreed by the court, that a penny for gardens and orchards, can only be for ancient gardens and orchards. *Bunb.* 79.

IX. Fruits of trees, as apples, pears, acorns.

1. Fruit of trees, as apples, pears, plums, cherries, and the like, are prædial tithes, to be paid in kind when they are gathered; unless there is some modus or rate tithe paid in lieu thereof. *God.* 408. Fruits of orchards.

Which fruits if they are stolen, and not gathered by the owner, the parson as well as the owner shall bear the loss: But if the owner doth suffer a stranger to pull or take his fruits, the tithe shall be answered. *Hetl.* 100.

If the soil of an orchard be sown with any kind of grain, the parson shall have tithe of the fruit trees and of the grain, as also of the grass or hay; for they are of several and distinct kinds. *1 Roll's Abr.* 642. *Deg. p. 2. c. 3.* *God.* 412.

2. Dr Godolphin says, mast of oak or beech, if sold, the tenth penny is payable for the tithe thereof; but if eaten by swine, then the tenth of the value or worth thereof. *God.* 417.

And so Lindwood saith, if the said fruits shall be sold, there shall be paid the tenth penny: and if they be not sold, but the hogs do feed thereupon, then the owner of the hogs shall pay the tithe according to the value of such fruits. *Lindw.* 200.

And there is a writ of consultation in the register for the tithes of pannage. And lord Coke says, for acorns tithes shall be paid, because they renew yearly. And in *Reynolds's* case, *T. 2 Jac.* it was said, that of acorns severed tithes are payable. *Gibf.* 676. *Mo.* 762.

But where the case was, that the acorns dropt from the trees, and the hogs eat them, a distinction was made, that they shall not be tithable, unless gathered and sold. *Het.* 27. *Litt.* 40. *Gibf.* 676.

In short, the case of acorns seemeth not different from that of other things tithable; if gathered, they shall pay tithes in kind; and the tenth penny, or 2sh in the pound, in all such like cases, is not to be considered as exclusive of the tithes to be paid in kind, but only as a reasonable satisfaction when the parishioner disposeth of his whole produce unsevered. And where the acorns are not gathered by the owner, but suffered to be fed upon as they drop; the case seemeth to fall under the same equity, as where turnips are fed upon by unprofitable cattle, for which an agistment tithe shall be paid.

X. Calves, colts, kids, pigs.

The tenth *calf* is due to the parson of common right, to be taken when it is weaned, and not before: and it is recoverable in the spiritual court, as appears from a writ of consultation in the register. And in case there are fewer than ten, it hath been adjudged a good custom (which evidently did spring from the canon law), that if there are seven, the parson shall have one calf; if under seven, then an halfpeny, or what custom shall direct for each calf. *Gibf.* 708.

But in most places, as it seemeth, at this day, the custom hath obtained (which is the proper rule in all such cases, and is equitable in it self), that if there are five, the parson shall have the value of half a calf, lamb, or other such like; if there are six, he shall have one intire; and shall receive or pay out respectively a proportionable sum, for each number under five or above six.

The canon law leaves it to the choice of the parson, when they are under the full number, whether he will proceed in the like manner, or let them run on till one becomes due in the ensuing year; but the common law will not allow of this, because tithe must be paid annually. *1 Roll's Abr.* 648.

Thus in the case of *Egerton and Still*, *T.* 1725. it was decreed, that where there are above ten calves, lambs, pigs, or the like; the tithe of the odd number above ten shall be paid according to the value, and not be carried over to the next year. *Bunb.* 198.

Colts are tithable in the same manner as calves. *Gibf.* 678.

Also tithe of *pigs* is to be paid in the same manner as tithe of calves. *Gibf.* 684.

And generally, the *time* of payment of the tithe of calves, colts, kids, pigs, and such like young of cattle, is when they are so old that they may be weaned, and live without the dam upon the same food that the dam eateth; unless the custom of the place confine the payment to any certain time or age. *Deg. p. 2. c. 6.*

In the case of *Heaton* impropiator of Garthorp in Lincolnshire, against *Regal*: The defendant insisted on a custom in that parish, to set forth tithe lambs on the first of May. But the court disallowed of it, for that they were not fit to live without their dams, as appeared by the depositions in the case. And it was referred to three neighbouring justices of the peace, to inquire what was a fit time for setting forth tithe lambs in that country; who certified the first of August in their judgment to be a proper time. And the court approved of it.

So in the case of *Crofts*, rector of Upper Clatford in Hampshire. The defendant insisted on a custom in that parish, to set forth tithe lambs at St Mark's day. The court declared it to be a void custom, and that the time for setting forth tithe lambs is, when they are fit to live without their dams, and thrive on the same food that their dam lives on, and when the owner weans his own.

T. 9 G. Reynolds rector of Stoke Charitie in Hampshire, against *Vincent*. The defendant insisted on the same custom with that before insisted on at Upper Clatford. Which, on citing the two former decrees, and hearing counsel on both sides, was again set aside for the same reason.

Upon the whole, one precise determinate day cannot be equally applicable to all places and seasons. This must depend in some measure upon the situation of the country, the time of putting their ewes to the ram, and the forwardness or backwardness of the season in general. What cometh nearest to the matter, where there is no special custom concerning the same, seemeth to be, what was declared by the court in the case of Upper Clatford abovementioned; namely, that the properest time for the parson to take the tithe is, when the owner weaneth the rest: for it is not supposable, that the owner will wean his lambs sooner, or keep them with the ewes longer, than they are fit to be weaned; the former being a prejudice to the lamb, and the latter to the ewe.

And as the parson is to have the tithes of the young and increase of the cattle, so he on his part is to observe the custom of the place, for the better propagation of their increase; otherwise any parishioner grieved may have an action on the case against him. As in the case of *Yielding and Fay, T. 39 Eliz.* An action upon the case was brought against the defendant as parson of Quarbey in the county of Southampton, declaring that within the parish there is a custom, that the parson at all times of the year had used to keep a common *bull* and a *boar*, for the common use of the kine and fows of the parishioners, for the increase of calves and pigs within the parish; and that the defendant being parson there, had neglected to keep them; by reason whereof, the plaintiff being an inhabitant had lost the increase of his cattle. And the court was of opinion, that this was a reasonable custom; and that every inhabitant, prejudiced by the not keeping the bull and boar might maintain the action. *Cro. El. 569.*

And the like was decreed in the case of *Philips and Symes, T. 1724. Bunb. 171.*

XI. Wool and lamb.

1. Wool and lamb are generally reckoned mixt small tithes. *Gibf. 2 mixt small tithe. 682, 686.*

2. Tithe of wool de jure is due at the time when it is clipped; but At what time by prescription it may be set out all together at another time. *Watf. due. c. 50.*

Regularly, the time of payment of the tithe of lambs (as was observed more particularly under the last head) is, when they are weaned, and can live without the dam; unless the custom of the place be otherwise. *God. 416. Bunb. 133.*

3. In the case of *Wilson* and the bishop of *Carlisle, T. 13 Ja.* *Wilson* brought a prohibition against the bishop, who held the living of *Graystock* in commendam; and said, that there was within the parish of *Graystock* this custom for tithing of wool, that if any inhabitant have

five fleeces of wool or above, he shall after the shearing and binding up of the same, without fraud or deceit, pay to the rector (after notice given) the tenth part thereof, at the door of the mansion house of such person inhabiting within the said parish, without sight or touch of the nine parts by the rector or his agent; and that the parsons have so accepted it. To this the bishop demurred in law. And it was adjudged for the bishop with one consent. For the substance of the prescription is laid, that the very true tenth is and ought to be paid without fraud; which is not prescriptible, for it is common right. Then the sole point prescriptible is, that this is without view or touch of the nine parts; which is, in effect, repugnant to the other: for when you have laid the truth in the former part, you lay the way to fraud in the latter. For it is against common reason, that any man judge or divide for himself, and then take choice of his own division, against the rule of partition laid down by Littleton; for the truth of the tenth depends upon the proportion it holds with the nine parts; and therefore for the parishioner to set out a part for the tenth, which he only affirms to be just, is to give him merely power to tithe as he lists; and the prescription were as reasonable as to say plainly, that they might set out what tithe they pleased. And it is a weak answer to say, that if it be not a just tenth, he may refuse it, and sue for his due. For he hath no means to be assured whether it be true or not; so his suit may be causeless: Sure he may be, it will be fruitless. But the law was provided, not to cause, but to prevent suits; and therefore provides, that things be done by indifferent means and persons, that there be no just suspicion of indirect dealing. *Hob. 107.*

So in the case of *Christian* against *Wren* and others, *M. 1732*; on a bill by the vicar of Crosthwaite in the county of Cumberland for tithes, the defendants insisted on a customary manner of payment of tithe wool of the elder sheep, by weighing the wool, and delivering the tenth part without fraud to the vicar, without his seeing or touching it: but this was over-ruled, on the authority of the aforesaid case in *Hobart. Bunb. 301.*

In the same case, the parishioners insisted, that they ought to pay no tithe of hog wool (that is, of the wool of sheep of a year old); alleging that no tithe thereof had ever been paid; that the tenth lamb having been paid (or a composition for the same), the other nine should not pay tithe of their wool that same year; and insisting further, that a modus being paid for the tithe lambs, the said modus included also the tithe of the hog wool. But the evidence not coming up to the proof of its being included within the modus, and the other allegations being plainly setting up of a non decimando; it was decreed, that the tithes of the hog wool should be paid as well as of all the other wool. (For it is clearly a new increase.)

By a constitution of archbishop *Winchelsea*, it is ordained as follows: Of the young of animals, as of lambs, we do ordain, that for six lambs and under, six half pence be given for the tithe; but if there be seven lambs in number, the seventh lamb shall be given to the rector for tithe; yet so, that the rector of the church who taketh the seventh lamb, shall pay

to the parishioner of whom he taketh the tithe three half pence in recompence; he that taketh the eighth lamb shall give a penny; he that taketh the ninth shall give an halfpenny to the parishioner: or the rector (if he pleaseth) shall stay till the next year, until he may take a full tenth lamb; and he who so stayeth, shall take always the second best lamb, or the third at least, of the lambs of the second year; and this, for his staying the first year. And so it is to be understood of the tithe of wool. *Lind. 191.*

And these sums, according to the value of money at that time, were computed as a reasonable equivalent.

But where it is said that the rector shall have his election to take his tithe in that manner, or to let them run on till a lamb or fleece be due in the ensuing year, that is not allowed by the common law; for tithes must be paid annually. *Deg. p. 2. c. 6.*

Also (as was observed before) custom, which is a part of the common law, seemeth to have established in most places, that the parson shall have half the value of a lamb at five, and a lamb intire at six, and shall receive or pay out proportionably for the numbers under five and above six.

If the custom be to pay the tithe of wool by the pound, and there be under ten pounds of wool; in such case a reasonable consideration shall be paid; because being due de jure, a modus in non decimando cannot be allowed in any case. *1 Roll's Abr. 648.*

4. By a constitution of archbishop *Winchelsea*; lambs, and other tithable young, shall be tithed proportionably, having regard to the different places, where they are begotten, brought forth, and nourished, and to the times which they have continued therein. *Lind. 197.*

How to be proportioned in different parishes.

And by another constitution of the same archbishop; if the sheep be kept in one parish in winter, and in another parish in the summer, the tithe shall be divided proportionably, according to the time that they shall continue in each parish. *Lind. 194.*

But no space less than that of thirty days, shall be reckoned in the computation; that is to say, of thirty days together, and not by intermission. *Lind. 198.*

Whereupon Dr Wood observeth, that if lambs are yeaned in another parish, and do not tarry there thirty days or more; no tithe is due for them to the parson of that place. *Wood b. 2. c. 2.*

And Dr Godolphin says, If sheep stray out of one parish into another, and there yearn, no tithe is payable for this to the parson of that place; but if they go there for thirty days or more, for this a rate tithe is payable to that place; for, for sheep removed from one parish to another, each parson must have tithe pro rata: but under thirty days no rate tithe is to be paid. *God. 438.*

Again, by one of the aforesaid constitutions, If sheep do couch in one parish, and feed in another, the tithe shall be divided between the two churches: Yet (saith Lindwood) not equally, but proportionably; for the far greater part ought to be assigned to that church, within the parish

whereof they fed for the time, than to that where they only couched. *Lindw.* 198.

And further; by the said constitution it is ordained, that if foreign sheep shall be shorn in any parish, the tithe shall be there delivered to the rector of the church, unless he can be sufficiently informed, that satisfaction hath been made for the tithe elsewhere, so as lawfully to hinder the payment thereof in such parish where they are shorn. *Lind.* 197. *God.* 438.

In like manner, If a person shall buy or sell any sheep, and it is certain from what parish the sheep do come, the tithe thereof shall be proportionably divided between the two parishes: but if it be uncertain; that church shall have the whole tithe, within the limits whereof they are found at the time of shearing. *Lind.* 194.

But Mr Bunbury seemeth to be of opinion, that the tithe of lambs must be paid where they fall, and is not a divisible thing, as wool is. *Bunb.* 139.

And it is now clearly held, that the tithe both of wool and lamb shall be paid where the sheep lamb or are shorn.

Indeed, if the sheep be carried away unnecessarily, and but a little before shearing or lambing time; this is fraudulent: and the tithes shall be paid, in such case, in that parish from whence they were fraudulently removed.

But if they shall be removed without fraud; it is held in equity, that no part of the tithe of wool or lamb will be payable in that parish from whence they were removed, but an agistment tithe must be paid for them, as for cattle yielding no profit to the incumbent there; and that these tithes are in no case to be divided, but the whole to be paid where they lamb or are shorn, and an agistment tithe for them as unprofitable cattle in every other parish where they have been depastured.

And no regard is had to the distinction, whether they have continued for less than a month; for there is the same equity, that tithes shall be paid for one day as for thirty.

Sheep removed to avoid the payment of tithe lambs.

5. In the case of *Boys and Ellis*, *M.* 1723; in a bill for tithes, a question arose, whether there was fraud in tithing lambs, on this case: The ewes were kept by the defendant in the parish of Driffeld in the county of York (where the demand lay), all the year until Christmas, when they were ready to drop their lambs, and then were removed into the parish of Skern (where there was a small modus only for lambs), and there kept till lady day, for convenience of forage (as insisted upon by the defendant); and at lady day were brought back to Driffeld: Note, the land in Skern was the defendant's own land. By the court; Here is not a sufficient proof of fraud: and the plaintiff's bill was dismissed. But Page and Gilbert barons thought, at first, it might be proper to send it to an issue, to try whether fraud or not fraud, and whether this had been the usual method of the defendant's course of husbandry; but afterwards they concurred with baron Price. *Bunb.* 139.

6. There is no doubt, but that wool is tithable de jure; and therefore ^{Sheep dying,} it hath been adjudged, that however for the pelts or fells of sheep killed ^{or killed.} and spent in the house, no tithe shall be paid, yet the wool shall pay tithe: and for these, as well as for sheep which die, a consultation is provided in the register. *1 Roll's Abr.* 646. *God.* 429, 463. *Deg. p.* 2. c. 6. *Gibf.* 686.

But others have holden, that if sheep be shorn, and die of the rot or other disease before the next shearing time, the wool is not tithable, unless the parson can prescribe to have it. *Watf. c.* 49.

In the case of *Brinklow* and *Edmonds*, *M.* 1731; an halfpeny payable on the shearing day, for the wool of each sheep dying between Candlemas and shearing day, was admitted and established as a good modus. *Bunb.* 307.

7. If a man pay tithe lamb at Mark's tide, and afterwards at Mid-Lamb's wool. summer he sheareth the residue of the lambs, to wit, the nine parts; he ought to pay tithe of the wool thereof, altho' there are only two months between the time of payment of the tithe of the lambs unshorn, and of the shearing of the residue, for this is a new increase. *1 Roll's Abr.* 642.

So in the case of *Baker* and *Sweet*, *M.* 1721, it seemed to be admitted, that the wool of lambs shall pay tithes, altho' the lambs had paid tithes two months before. *Bunb.* 90.

And in the case of *Carthew* and *Edwards*, *T.* 1749. The plaintiff brought his bill, amongst other things, for the tithe of the wool of lambs. The defendant answered, that he apprehended no tithe of lambs wool to be due, the plaintiff having received the full tithe of the lambs in their wool. But by the court it was declared, that the tithe of the wool of lambs was due to the plaintiff, and decreed accordingly.

So where a modus is paid for a tithe lamb, and the other nine lambs are shorn; tithes shall be paid of the wool thereof: for wool and lamb are different species of tithes, and therefore a modus for lambs is no satisfaction for the tithe of wool.

8. By a constitution of archbishop *Winchelsea*; tithes of wool shall be ^{Sheep agisted.} paid to the incumbent, in whose parish the sheep have remained constantly from the time of shearing till Martinmas, tho' they be afterwards removed; and if they be removed within the said time from parish to parish, each incumbent in whose parish they shall remain at least thirty days shall have his proportion of the wool; but if they be removed from parish to parish after the said time (that is, from Martinmas to the time of shearing), a reasonable agistment shall be paid by the owners for the time they stay. *Lind.* 197.

But this seemeth not to be law at this day: but the tithe in kind of wool shall be paid only in the parish where the sheep are shorn; and an agistment tithe in the other parishes where they have been depastured. Otherwise it might be very inconvenient to proportion and divide the wool; especially where the parishes shall be (as it may happen) at a very great distance.

And

And in a case where the owner of the sheep had depastured them in the parish, from Michaelmas to lady day, and then sold them; upon suit in the spiritual court for a tenth of the bargain, the owner to obtain a prohibition surmised that he could pay a tenth of the wool, according to the custom of the parish: But a prohibition was denied, because the parson was defrauded of all, if he had not the tenth of the bargain; inasmuch as the sheep were gone out of the parish, and he could not have any wool, because it was not the time of shearing. *Poph. 197.*

[Upon the whole, it is observable, that the measures of right in the ecclesiastical courts by the canons, and in the courts of equity by the rules of equity (without much regard to the canons), is very different; which may cause confusion in these respects. In the former case, the last resort is to the delegates; in the latter, to the house of lords.]

Locks of
wool.]

9. No tithe shall be paid of locks of wool, if it appear that they were casually lost; but otherwise, if by contrivance and fraud. *2 Inst. 652. God. 462.*

Where the custom is, to shear the necks of sheep about Michaelmas, to prevent the tearing off of the same by thorns and briars in the winter; if this be done without fraud, and not to deceive the parson, then no tithe shall be paid for the same. *1 Roll's Abr. 645.*

So if a parishioner cut off the dirty locks of his sheep for their better preservation from vermin, before the time of shearing, and this without fraud; no tithes shall be paid thereof. *1 Roll's Abr. 646.*

Several flocks
depastured to-
gether.

10. If several mens sheep depasture together in one flock, or under one shepherd; yet this shall not make them to be tithed together, but every owner shall pay his tithe of them by himself: but if the head of a family hath his flock mixed with his childrens sheep which are under his tuition, and he takes the profit of them to his own use, in that case they shall be tithed together. *Lind. 193. Deg. p. 2. c. 6.*

Modus.

11. It hath been held, that if a man prescribe to pay an halfpenny for every lamb that he shall sell before the first day of May, and (to deceive the parson) shall sell all his lambs the day before May day; this is fraudulent, and the custom shall be no discharge. *1 Roll's Abr. 652.*

It is not a good modus, to pay every tenth pound of wool for the tithe of wool, if he doth not shew that he hath paid something if his wool do not amount to ten pounds; for otherwise this is in non decimando if it be under ten pounds, for the tenth part thereof is due. *1 Roll's Abr. 648.*

If a prescription be, that if the owner hath under the number of ten fleeces of wool, he shall pay one penny to the parson for the tithe of each of them; and if he hath more, that then he shall deliver to the parson the tenth part of his wool upon his conscience without fraud or covin, without the parson's seeing or touching the nine parts; this is not a good modus, for that it is unreasonable, and is in effect to give to the parson no more than the parishioner pleased. *1 Roll's Abr. 648.*

A custom to pay tithes in kind for sheep, if they continue in the parish all the year, and if they be sold before shearing time, but a halfpeny for every one so sold, hath been held an unreasonable custom. *Bob. 94.*

A modus to pay the tenth part of the wool of all the sheep which he had before lady day, in satisfaction of all the wool of such sheep as should by him be brought into the parish after lady day, hath been allowed to be good. *1 Roll's Abr. 649.*

So also a modus to be discharged of tithe of those he should sell but two days before the shearing, in consideration that time out of mind he hath paid tithe wool of those which he bought but two days before the shearing, hath been allowed to be good. *1 Roll's Abr. 649.*

XII. Milk and cheese.

1. Milk is a mixt tithe. *Gibf. 713.*

A mixt tithe.

2. Where tithe milk is paid in kind, no tithe cheese is due; and where tithe cheese is paid in kind, no tithe milk is due: In which case, as in all other like cases, the custom of the place is to be observed. *Deg. p. 2. c. 6. God. 392.*

Not milk and cheese both.

3. And by a constitution of archbishop Winchelsea; *The tithe of milk shall be paid, from the time of its first renewing, as well in the month of August as in other months.* *Lind. 199.*

Payment thereof by canon.

Upon what pretence the people pleaded exemption from paying tithe of milk in August, Lindwood doth not inform us: probably it was, because this was the principal harvest month; and they thought it too much to pay tithe of milk while they were paying tithe of corn, and fed their harvest people with the milk. *Johnf. Winch.*

Lindwood explains the milk here spoken of, to signify either that of cows, or sheep, or goats, or other cattle which are milked. *Lind. 200.*

But the tithe of the milk of ewes seemeth only to be due by custom: for a man may prescribe that by the custom of the country where he is sued for tithes of the milk of ewes, no tithes of the milk of ewes have been paid for time whereof the memory of man is not to the contrary; and in such case a prohibition will be granted. *1 Roll's Abr. 654.*

4. By a constitution of archbishop Winchelsea: *The tithe of the milk and cheese of cows and goats shall be paid where they feed and couch.* *Other- wise, if they couch in one parish, and feed in another, the tithe shall be divided between the rectors.* *Lind. 199.*

Different parishes.

But it may be doubted perhaps, as the law seemeth now to stand, whether they shall not pay tithe in kind only in the parish where they are milked, and an agistment tithe in the other parish.

M. 8 W. Scoles and Lowther. Lowther was parson of the parish of Swillington, and Scoles lived in Kippax the next adjoining parish, and occupied a large parcel of arable land in Kippax, and had also forty acres of meadow and pasture in Swillington, and four acres of arable land. Lowther libelled in the spiritual court of York against Scoles, for tithes of the cattle depastured in Swillington. Scoles, upon a suggestion that cattle kept for the pail for the use of the house ought not by the law to pay

pay tithes, and that this cattle for the tithes whereof Lowther now libels is such, moved for a prohibition. And it was granted to him, unless cause shewn. And now, upon affidavit that Scoles carried the milk of this cattle to his house in Kippax, and used it there, it was moved that the rule might be discharged. And it was resolved by the whole court, that the defendant Lowther should have the tithes of this milk. *L. Raym.* 129.

And as to the tithe of the milk of sheep, it is ordained by the said constitution, that *in the parishes where the sheep continually feed from the time of shearing to the feast of St Martin in the winter, the tithe of their milk and cheese shall be fully paid to the churches there, altho' they shall be afterwards removed from that parish and be shorn elsewhere. And if within the foresaid time, they be removed to pasture in divers parishes; every church, according to a proportionable part of the time shall receive the tithe thereof; but no space less than that of thirty days shall be reckoned in the computation. But if after the feast of St Martin, they be carried to pastures elsewhere, and be fed even until the time of shearing in one or in divers parishes, in the pastures of their owner or of any other; the pastures shall be valued having respect to the number of sheep, and according to such valuation of the pastures the tithes shall be demanded of the owners of such pastures.* *Lind.* 197.

And the reason is, because after the feast of St Martin sheep are not usually milked. And therefore this constitution requireth, that the tithe be paid according to the value of the pasture for so many sheep there depastured. Otherwise if they should lie there, and in the mean time give milk, and cheese should be made thereof, then the tithe of milk and of cheese should be paid as they should fall out. *Lind.* 198.

When milk
shall be paid,
and when
cheese.

5. By another constitution of the same archbishop, *the tithe of milk shall be paid in cheese, whilst the parishioner maketh cheese; but in the autumn and winter it shall be paid in kind; unless the parishioners will for the same make a competent redemption, to the value of the tithe and the benefit of the church.* *Lind.* 194.

But the canon in this, as in other instances, is generally overruled by the custom of the place; for in many places they pay the milk in kind all the year; in some places they pay only cheese; and in some neither cheese nor milk, but some small rate for it: and the custom of the place in this, as in all other tithing, is to be observed, notwithstanding the canon. *Deg. p. 2. c. 6.*

Agistment of
milk cattle.

6. When milch cows are become dry, and are depastured as dry cattle, tho' but for a month; an agistment tithe shall be paid for them: and so it is, if they are fatted and sold. *Bob.* 96.

Manner of
tithing.

7. The tithe of milk is to be paid, not by the tenth part of every meal, but by every tenth meal intire. *Bunb.* 20.

In the aforesaid case of *Scoles* and *Lowther*, it was said by the court, that of common right tithe milk is payable at the parsonage or vicarage house; in which particular this tithe differs from all others, which must be fetched by the receiver: but by custom the payment may be made in the church porch, whither it shall be brought by the parishioners. *L. Raym.* 129. *Wood b. 2. c. 2.*

But

But in the case of *Dodson and Oliver, E. 1721*; it was decreed, that if there be any custom in a parish for the manner of tithing milk, as to carry it to the church porch, or parsonage house, that must be observed by the parishioner; but if there be no particular custom or usage, the parishioner is obliged de jure to pay every tenth meal, to milk the cows at the usual place of milking into his own pails, and the parson is obliged to fetch it away from the milking place in his own pails in a reasonable time; and if he doth not fetch it before the next milking time, the parishioner may justify pouring the milk upon the ground, because he hath occasion for his own pails. And it was determined by the whole court of exchequer in this case, that the milk ought not to be carried either to the church porch, or to the parson's house, and that it ought to be fetched by the parson. *Bunb. 73.*

So in the case of *Carthew and Edwards, T. 1749.* Edward Carthew, clerk, rector of St Mewan in Cornwall, brought his bill in the exchequer (amongst other particulars) for the tithe of milk. The defendant Edwards in his answer set forth, that the plaintiff having declared he would not send for or fetch the tithe milk, he did order every tenth meal of his cows to be turned upon the ground; it not being usual or customary for the parishioners of the said parish, to carry their tithe milk home to the rector. The court, upon hearing the cause, and ordering two decrees in the said court to be read, wherein *Dodson* was plaintiff and *Oliver* defendant, did declare, that the defendant ought to have milked the tenth meal of his cows, in vessels of his own, at the place and in the manner he milked the other nine meals, and that the plaintiff ought to have fetched it away in his own vessels.

8. It hath been adjudged a good modus, in consideration of the payment of the tenth cheese made from the first of May until the last of August, to be discharged from the tithes of milk; for this is not tithe in kind of part in discharge of the whole, for no tithe in kind is due of cheese, but only of milk, and so this is a good consideration. *1 Roll's Abr. 651.* Modus.

A custom that every inhabitant in the parish, who kept cows there, had used time out of mind to set out the whole meal of milk upon the ninth day of May at night, and upon the tenth day of May in the morning, and so upon every ninth day then next following, until one lamb (to be yeaned in the year following) should be heard to bleat there, hath been adjudged an unreasonable custom; because in such case it might be contrived that lambs shall come so soon, as to deprive the parson of the tithe milk for a great part of the year. *L. Raym. 358.*

M. 1731. Brinklow and Edmonds. A bill was exhibited to establish several modus's in the parish of Newton Longville in the county of Buckingham: One of which was, that tithe milk ought to be paid by every tenth evening and morning's meal in kind, from Hoe monday to the second day of November, to commence upon the evening of Hoe monday (that is, the monday fortnight after easter day), and the morning following, to be taken by the rector at the place of milking, and no tithe milk to be paid for the residue of the year. But by the court, this is

void upon the face of it, being only a payment of part for the whole.
Burb. 307.

XIII. Deer and conies.

Deer.

1. Deer, being *feræ naturæ*, are not tithable without special custom. But if tithe thereof be due by custom, it must be paid.

Conies.

2. Conies also, being *feræ naturæ*, are not tithable of common right.

1 *Roll's Abr.* 635.

But tithes in kind, or a *modus* for them, may be by custom.

In the case of *Walton and Tryon*, *M.* 1751. A bill was brought by the plaintiff (amongst other things) for the tithe of rabbits, in a warren called Ashurst's warren. And he proved by the former incumbent's book, that the same had been compounded for, by payment of 20s in money and four couple of rabbits. For the plaintiff it was argued, that it is a great question, whether this be a *prædial*, *mixt*, or *personal* tithe. Customary tithes are generally deemed *personal* tithes; and if so, then a payment in lieu of tithes will be good. Rabbits are of that nature, that they are difficult for the parson to get them, the times of taking them uncertain, and therefore a small composition probably was taken for them. Suppose a composition was made for hay, originally at 5l; and afterwards a new agreement was made for 4l and one load of hay: this would be good, and an *assumpsit* would lie. The parson's book proves, that several couples were paid, and money also; and that book is always held to be good evidence.—For the defendant, it was answered, that this tithe can only depend on a customary immemorial right; and so ought to be laid in the bill. Here it is laid, to the tenth of the rabbits in kind; and the plaintiff demands it as such. But his evidence is directly contrary. For by that he proves a composition in lieu of tithes for them. Therefore, as his evidence contradicts his manner of laying his prescription, he must fail in his suit. As to the rector's book in this case, it is very modern; for it goes no further back than the year 1728. This indeed may be evidence of payment; but it can never be admitted as an evidence to support the right. — By the lord chancellor Hardwicke: The plaintiff by his bill demands tithes in kind. But there is no evidence of that. The evidence offered is, that four couple of rabbits have always been sent and delivered at the parson's house by the warrener, and 20s a year paid; and so proved by the former incumbent's book. And the argument by the plaintiff from this evidence is, that this is a composition for tithes in kind; and rightly argued, for the *modus* would be too rank. But the great thing with me is, this 20s a year. For the four couple of rabbits can neither be *modus* nor composition. Indeed payment of part of a thing in money, and part in kind, has been held to be good. But I can determine nothing on this question: but it must go to be tried as to the custom.

XIV. Fowl.

1. Of fowls which are domestick, and not *feræ naturæ*, tithes are to be paid; as geese, hens, ducks: and the manner of tithing them is, either by paying the tenth egg, or the tenth of their young, according to the custom of the place, but not both; for where tithe of eggs is paid, there is no tithe of the young; and where the tithe of young is paid, there shall be no tithe of eggs. *God. 405. Deg. p. 2. c. 11.*

2. It is said, that swans also, as being tame fowl, shall pay tithe. *Swans. Deg. p. 2. c. 11.*

3. In the case of *Haughton* and *Prince*, it was affirmed, that turkies are to be ranked amongst things that are *feræ naturæ*; and consequently not tithable. *Mo. 599.*

But in the case of *Carleton* and *Brightwell*, *T. 1728*; where tithes were demanded of turkies, and it was objected that turkies were things *feræ naturæ*, and not tithable any more than partridges, and that turkies were not brought hither from beyond sea before the time of queen Elizabeth; it was declared by the court, that it doth not appear but that turkies are birds as tame as hens, or other poultry, and therefore must pay tithes. *2 P. Will. 462, 463.*

4. It is said, that of pigeons sold tithes ought to be paid; but not if they be spent in the house. *1 Roll's Abr. 635.*

But by custom pigeons spent in the house may be tithable; tho' not of common right. *1 Roll's Abr. 642.*

5. If a man hath pheasants or partridges, and keepeth them in a place inclosed, and clips their wings, and from their eggs hatcheth and bringeth up young pheasants or partridges; no tithes shall be paid of these eggs or young, because they are not reclaimed, but continue *feræ naturæ*, and would fly out of the inclosure, if their wings were not clipped. *1 Roll's Abr. 636.*

6. It hath been adjudged, that the paying of thirty eggs in lent, is a good modus for all tithes of eggs: which seemeth to cross the rule of the law, that every modus ought to be somewhat, as to kind, different from the thing that is due. *Gibf. 679.*

But it is to be considered, that this custom doth bind the parishioner to the payment of so many eggs, whether he hath hens or not; so that he may be obliged to buy eggs, to pay the prescription; and this is what makes it a good custom: but if the custom had been, that he should pay thirty eggs of his own hens; the custom would have been ill. *L. Raym. 358.*

XV. Bees.

Bees are reckoned amongst the things that are *feræ naturæ*, and by consequence tithe free; and it hath been adjudged, that they shall not be paid in kind by the tenth swarm. *Gibf. 677.*

But of the wax and honey of bees tithes shall be paid in kind *de jure*. *1 Roll's Abr. 635.*

And that is, by the tenth measure of honey, and the tenth weight of wax. *God. 389. Deg. p. 2. c. 7.*

And there is a consultation provided in the register, for the tithe of honey and of the wax of bees.

XVI. Mills, fishings, and other personal tithes.

Mills.

1. By the books of common law it appeareth, that some tithe or other is due for a mill. 2 *Inst. 621.*

The canonists hold, that this is a prædial tithe, and that the tenth toll dish ought to be paid for the same, without deduction of expences: but this doth not agree with the common law, and therefore is not binding. *Deg. p. 2. c. 9.*

In the case of *Dodson and Oliver, E. 1721*, in the exchequer; Price and Mountague barons were of opinion, that an ancient corn mill ought to pay the tenth toll dish, which being a tenth part of the thing it self, was a prædial tithe, and due of common right: But the chief baron Bury and baron Page, that it is a personal tithe, and not due of common right; and the mill not having paid, is now exempt by the statute of the 2 *Ed. 6.* So the court being divided, the plaintiff had no decree. *Bunb. 73.*

But before this, in the case of *Newte and Chamberlain*, in the year 1706, it was decreed in the house of lords, on an appeal from the court of exchequer, that the tithes of a mill are personal tithes, contrary to several seeming authorities; and that in consequence of their being personal tithes, not the tenth of the toll, or the tenth dish of the corn ground belongs to the parson, but the tenth part of the clear profits, after the charges of erecting the mill, and the other charges of servants, horses, and other expences are deducted. *Vin. Dismes. M. a.*

And in the case of *Carleton and Brightwell, T. 1728*; a demand being made by the bill of the tithe of a corn mill, it was insisted, that every tenth toll dish was due. But it was replied, that this matter was determined in the aforesaid case of *Newte and Chamberlain*, in the house of lords, where a bill was brought for the tithes of a malt mill in Tiverton in Devonshire, and where the lords determined with the assistance of eight judges (whereof Holt chief justice was one) that mills were tithable, but that the same was a personal tithe, and so ought to be paid out of the clear gain after all manner of charges and expences deducted: Upon which authority, the master of the rolls decreed the mill in question to pay tithes, but that they should be paid only as a personal tithe. 2 *P. Will. 463. Vin. Dismes. M. a.*

By the statute of the 9 *Ed. 2. st. 1. c. 5.* *If any do erect in his ground a mill of new, and afterwards the parson of the same place demandeth tithe for the same, the king's prohibition shall not lie.*

A mill] This is only meant of a corn mill: for it hath been resolved, that fulling mills, tin mills, lead mills, plate mills, and the like, are not within this statute, nor is tithe due of such otherwise than by custom. *Gibf. 666.* Of

Of new] Therefore all corn mills, not erected before this statute are tithable. But because many mills since erected may be to us ancient, and their first erection not known, the rule of their discharge seemeth to be, that all such mills whose first erection was before time of memory and is not otherwise known by matter of record, and have not been subject to the payment of tithes, shall be intended to be erected before the statute, and so to be tithe free. But as to mills for which tithes have been paid, and new mills; tithes must be paid for them. *Bob. 127.*

Therefore when prohibitions are moved for to stay suits for tithes in the ecclesiastical courts for ancient mills, it must not only be suggested that the mill is an ancient mill, but also that it hath never paid tithes; and the courts of common law do generally require an affidavit to be made of the truth of such suggestion, to wit, that the mill is ancient, and hath not within memory paid any tithes. *Bob. 127.*

The king's prohibition shall not lie] T. 15 Ja. A prohibition was prayed to the spiritual court, upon a suggestion, that the parson libelled for tithes of a mill which was erected upon land discharged of tithes by the statute of monasteries 31 H. 8. c. 13. And denied by the whole court: for of a mill erected of new, a prohibition lieth not. *Cro. Ja. 429.*

If there is a modus in lieu of all tithes issuing out of a messuage and an ancient water mill for corn, and a new water mill for corn is erected within the said messuage; or if the stream on which an ancient mill stood is diverted by the owner (and not by the act of god), and a new mill erected upon the new stream; they shall not be discharged by virtue of any former modus. *1 Roll's Abr. 641.*

But if there hath been an ancient corn mill for which a modus hath been paid for time immemorial, and afterwards by continuance of time the mill stream changeth its course, and goeth in a place a little distant from the ancient stream, and thereupon the owner of the mill pulleth it down, and rebuildeth it in the new place where the stream now runneth; this shall be discharged of tithes by force of the ancient modus, for this cometh by the act of god, and not by the act of the party. *1 Roll's Abr. 641.*

So, the addition of a pair of stones to an ancient mill, doth not destroy the modus. *Carth. 215.*

But if the surmise be of a certain rate or modus for all mills erected and to be erected, and a mill there appears to be new; the modus cannot extend to it, by reason of the statute aforesaid. *3 Bulst. 212.*

2. It doth not seem to be agreed, whether or how far fish in ponds or *Fishings.* private fisheries are liable to pay tithes; and therefore the same must be referred to the customs of particular places.

But it seems that of these no tithe can be due, where no profit is made thereof, and where they are kept only for pleasure, or to be spent in the house or family; as fish kept in a pond generally are. *Bob. 135.*

Also fish taken in common rivers are tithable only by custom. *God. 406. Wood b. 2. c. 2.*

And

And in this case Lindwood says it is only a personal tithe, and shall be paid to that church where he who taketh them heareth divine service and receiveth the sacraments. *Lindw.* 195.

Where fish are taken in the sea, tho' they are *feræ naturæ*, and consequently not tithable of common right, yet by the custom of the realm they are tithable as a personal tithe, that is, not by the tenth fish, or in kind, but by some small sum of money in consideration of the profits made thereby after costs deducted. *1 Roll's Abr.* 636.

Upon which foundation, it is said, that if the owners of a ship do lend it to mariners to go to an island for fish, and are in consideration of such loan to have a certain quantity of fish when they come back; no tithe shall be paid by the mariners for what is given to the owners, because they are only to pay for the clear gain. *Gibf.* 679.

Other personal tithes.

3. By a constitution of archbishop Winchelsea, it is ordained, that *personal tithes shall be paid of artificers and merchandizers, that is, of the gain of their commerce; as also of carpenters, smiths, masons, weavers, innkeepers, and all other workmen and hirelings, that they pay tithes of their wages; unless such hirelings shall give something in certain to the use or for the lights of the church, if the rector shall so think proper: That is to say, they shall pay the tenth part of the profit, deducting first all necessary and reasonable expences.* *Lind.* 195.

And by the statute of the 2 & 3 Ed. 6. c. 13. *Every person exercising merchandizes, bargaining and selling, clothing, handicraft, or other art or faculty by such kind of persons, and in such places as heretofore within these forty years have accustomably used to pay such personal tithes, or of right ought to pay (other than such as be common day labourers), shall yearly at or before the feast of Easter, pay for his personal tithes the tenth part of his clear gains; his charges and expences, according to his estate condition or degree, to be therein abated allowed and deducted.* *§. 7.*

Provided, that in all such places where handicraftsmen have used to pay their tithes within these forty years, the same custom of payment of tithes to be observed and continue. *§. 8.*

And if any person refuse to pay his personal tithes in form aforesaid, it shall be lawful to the ordinary of the diocese where the party is dwelling, to call the same party before him, and by his discretion to examine him by all lawful and reasonable means, other than by the party's own corporal oath, concerning the true payment of the said personal tithes. *§. 9.*

Provided, that nothing in this act shall extend to any parish which stands upon and towards the sea coasts, the commodities and occupying whereof consisteth chiefly in fishing, and have by reason thereof used to satisfy their tithes by fish; but that all such parishes shall pay their tithes according to the laudable customs, as they have heretofore of ancient time within these forty years used and accustomed, and shall pay their offerings as is aforesaid. *§. 11.*

Provided also, that nothing in this act shall extend in any wise to the inhabitants of the cities of London and Canterbury, and the suburbs of the same, nor to any other town or place that hath used to pay their tithes by their houses, otherwise than they ought or should have done before the making of this act. *§. 12.*

This act restrains the canon law in three things: First, where the canon law was general, that all persons in all places should pay their personal tithes, the act restraineth it to such kind of persons only, as have accustomedly used to pay the same within forty years before the making of the act. Secondly, whereas by the ecclesiastical laws they might before this act have examined the party upon his oath concerning his gain; this act restrains that course, so that the party cannot be examined upon oath. Thirdly, by this act the day labourer is freed from the payment of his personal tithes. *Deg. p. 2. c. 22.*

It cannot be intended upon this act, that if such tithes have been sometimes paid within forty years, they are therefore due; but they must have been *accustomedly*, that is, constantly paid for forty years next before the act. *Deg. p. 2. c. 22.*

If it be demanded how such payment must now be proved forty years before the making of the act; the answer is, as in other like cases, *a posteriori*; by what has been done all the time of memory since the act. *Deg. p. 2. c. 22.*

Sir Simon Degge says, the only case that he could find for above a hundred years before his time, where the tithes of the profits of such trades were sued for by any clergyman, was that of *Dolley and Davis, M. 11 Ja.* which was thus: The parson of a parish in Bristol libelled in the spiritual court against an innkeeper, to have tithes of the profits of his kitchen, stable, and wine cellar, and did set forth in his libel, that he made great gain in selling of his beer, having bought it for 500l, and sold it for 1000l, of which gain he ought to have tithe by the common law of the realm. Upon which occasion, the clerk of the papers informed the court, that when one had libelled for tithes of the gain of 10l for 100l put out, a prohibition was granted: and the same was also granted in this case. *2 Bulst. 141.*

And personal tithes are now scarce any where paid in England, unless for mills, or fish caught at sea; and then payable where the party hears divine service, and receives the sacraments. *Wood b. 2. c. 22.*

VI. Of the setting out, and the manner of taking and carrying away of tithes.

1. By a constitution of archbishop Winchelsea, it is ordained as follows: General
*Because by reason of divers customs in the taking of tithes throughout divers manner of
churches, quarrels contentions scandals and very great hatreds between the setting out.
rectors of the churches and their parishioners do oftentimes arise; we will and
ordain, that in all the churches established throughout the province of Can-
terbury, there be one uniform taking of tithes and profits of the churches.
Lind. 192.*

Between the rectors of churches] Which is to be understood also of vicars, where the tithes belong to their portion. *Lind. 192.*

Throughout

Throughout the province] Per provinciam: Lindwood says, in some copies it was *archiepiscopatum* (as also it was in archbishop Grey's constitutions, from whence this was taken); but in a provincial council held at London under archbishop Chicheley the word *archiepiscopatum* by consent of the prelates and the whole clergy was taken away, and *provinciam* inserted in its place; Lindwood himself being then prolocutor. *Lind. 192.*

And profits of the churches] That is, which do not consist in tithes: as, oblations, mortuaries, and such like. *Lind. 192.*

But notwithstanding the canon, the manner or form of setting out or payment of tithes, is for the most part governed by the custom of the place.

Not before the crop is cut. 2. If the owner will not cut his crop before it be spoiled, the parson is without remedy. *God. 394.*

Parson may not set it out. 3. The parson, vicar, impropriator, or farmer, cannot come himself and set forth his tithes, without the licence and consent of the owner; for if he shall of his own head tithe the corn or hay of any landholder within his parish, and carry it away, he is a trespasser, and an action will lie against him for it. *Deg. p. 2. c. 14.*

Yet he may see it set out. 4. But every person is bound of common right, to cut down, and set out the tithes of his own lands. And that it may be done faithfully and without fraud, the laws of the church intitle the parson to have notice given him; but by the declarations of the common law, such notice is not necessary. Yet nevertheless, the common law declareth a custom of tithing without view to be an absurd custom: And by the statute of the 2 & 3 Ed. 6. c. 13. it is enacted, that at all times whensoever, and as often as any prædial tithes shall be due at the tithing of the same, it shall be lawful to every party to whom any of the said tithes ought to be paid, or his deputy or servant, to view and see their said tithes to be justly and truly set forth and severed from the nine parts.

Must take care of it, after it is set out. 5. The care of the tithes, as to waste or spoiling, after severance, rests upon the parson, and not upon the owner of the land. For it seemeth, that the parson is at his peril to take notice of the tithes being set out; and so it hath been declared, that altho' the parishioner ought de jure to reap the corn, yet he is not bound to guard the tithes of the parson. *Gibf. 689.*

May spread and dry it upon the ground. 6. But after the tithes are set forth, he may of common right come himself, or his servants, and spread abroad, dry and stack his corn, hay, or the like, in any convenient place or places upon the ground where the same grew, till it be sufficiently weathered and fit to be carried into the barn. But he must not take a longer time for the doing thereof, than what is convenient and necessary; and what shall be deemed a convenient and necessary time, the law doth not nor can define; for the quantity of the corn or hay, and the weather, in this case are to be considered; and what shall in this and all other cases of like nature be said to be a reasonable and convenient time, is to be determined by the jury, if the point come in issue triable by a jury; but if it come to be determined upon a demurrer,

demurrer, or other matter of law, the judges of the court where the cause depends are to resolve the same. *Deg. p. 2. c. 14. Str. 245.*

7. And it shall be lawful quietly to take and carry the same away. And if any person carry away his corn or hay, or his other prædial tithes, before the tithe thereof be set forth; or willingly withdraw his tithes of the same, or of such other things whereof prædial tithes ought to be paid; and if any person do stop or let the parson, vicar, proprietor, owner, or other their deputies or farmers, to view, take, and carry away their tithes as is above said; he shall forfeit double value, with costs; to be recovered in the ecclesiastical court. *2 & 3 Ed. 6. c. 13. f. 2.*

And he may carry his tithes from the ground where they grew, either by the common way, or any such way as the owner of the land useth to carry away his nine parts. But if there are more ways than one, and the question is, which is the right way; this is cognisable in the temporal court. *Deg. p. 2. c. 14.*

And if the owner of the soil, after he hath duly set forth his tithes, will stop up the ways, and not suffer the parson to carry away his tithes, or to spread, dry, and stack them upon the land; this is no good setting forth of his tithes without fraud within the statute: but the parson may have an action upon the said statute, and may recover the treble value; or may have an action upon the case for such disturbance, as it seemeth; or he may, if he will, break open the gate or fence which hinders him, and carry away his tithes. *Deg. p. 2. c. 14.*

8. But in this he must be cautious, that he commit no riot, nor break any gate, rails, lock, or hedges more than necessarily he must for his passage. *Deg. p. 2. c. 14.* But must not do wilful damage.

And when he comes with his carts, teams, or other carriages, to carry away his tithes; he must not suffer his horses or oxen to eat and depasture the grass growing in the grounds where the tithes arise, much less the corn there growing or cut: but if his cattle (as cannot be avoided) do in their passage, against the will of the drivers, here and there snatch some of the grass, this is excusable. *Deg. p. 2. c. 14.*

9. It seems, that if tithes set forth remain too long upon the land, the owner of the soil may take them damage feasant; but then, if he be sued for them, in order to justify he must set forth how long they had remained before he took them; and when they shall be said to remain too long is triable by the jury. *Watf. c. 54.* Penalty on not carrying it away.

Or an action upon the case will lie against the parson for his negligence in this behalf: But no action in such case will lie, unless the parishioner hath duly set forth his tithes, and hath also given notice to the parson that they are so set forth. *Deg. p. 2. c. 14. L. Raym. 187.*

But the occupier of the ground cannot put in his cattle, and destroy the corn or other tithe; for that is to make himself a judge, what shall be deemed a convenient time for taking it away: but the court and jury, upon an action brought, are to determine of the reasonableness of the time, and of the recompence to be made for the injury sustained. *L. Raym. 189.*

VII. Tithes how to be recovered.

Incumbent
compelled to
demand.

Who to be
sued.

To whom to
be paid, where
the parish is
not known.

1. That tithes may not be lost to the successors, it is enjoined by a constitution of archbishop *Winchelsea*, that the rectors and vicars of churches, who respecting the fear or favour of men more than the fear of god, shall not demand their tithes with effect, shall be suspended, until they pay half a mark of silver to the archdeacon for their disobedience. *Lind.* 191.

2. The general rule is, that the owner of the nine parts is to be sued for the tenth. But this rule admits of divers exceptions: As,

First, If a parishioner let his ground or herbage, it is said, that the parson may sue either the owner of the ground, or the owner of the cattle, at his election, for the tithe; if the custom be not against it. *God.* 413.

But in the case of *Fisher* and *Lemen*, where cattle were depastured occasionally in another man's ground; it was agreed by the whole court of exchequer, that the owner of the land, and not the owner of the cattle, was to pay the tithes: And baron Page said, that as to what had been said, that the demand might be either against occupier or agister, that could not be; for the same duty could not arise in two different persons at the same time. *Viner.* Dismes. L. a.

So, If hay be put into ricks on the ground, and after sold; the buyer cannot be sued for the tithe, but the feller may, in case the tithe thereof was not paid before. *God.* 412.

But if one sells underwood standing, or corn or grass on the ground; the buyer, and not the feller, shall pay the tithes. *Bob.* 158.

But if any part thereof be cut before the sale, the feller must answer the tithe thereof. *Bob.* 159.

So where one sells sheep, whereof the parson is to have a rate tithe; the feller, and not the buyer, must pay the tithe for them. *Bob.* 158.

So if one that is owner of a coppice or wood, do cut it down, and sell it all together; in this case the feller, and not the buyer, must answer for the tithes. *Bob.* 159.

If cattle or other goods tithable be pawned or pledged; it is said, that he to whom they are pledged must pay tithe of them. *Bob.* 159.

But if a man deliver cattle or goods to one, to be re-delivered to him; he himself, and not the person to whom they are delivered, must pay the tithe for them. *Bob.* 159.

If a parishioner die before he pay his tithes; his executor, if he hath assets, must pay them. *Bob.* 159.

3. By the 2 & 3 *Ed.* 6. c. 13. Every person who shall have any beasts or other cattle tithable, going feeding or depasturing in any waste or common ground, whereof the parish is not certainly known, shall pay tithes for the increase of the said cattle so going in the said waste or common, to the parson, vicar, proprietor, portionary, owner, or other their farmers or deputies, of the parish, hamlet, town, or other place, where the owner of the said cattle inhabiteth or dwelleth. *f.* 3.

4. In the saxon times, tithes were recoverable in the county court, where the bishop or his deputy, and the sheriff, did sit as co-ordinate judges, there being at that time no separate court of ordinary ecclesiastical jurisdiction. 2 Inst. 661. Anciently recoverable in the county court.

5. By a constitution of archbishop Winchelsea: *Forasmuch as many are found, who are not willing freely to pay their tithes; we do ordain, that the parishioners be admonished once, twice, and thrice to pay their tithes to god and the church. And if they do not amend, they shall first be suspended from the entrance of the church, and so at last be compelled to pay their tithes by censures ecclesiastical, if it shall be necessary. And if they shall desire a relaxation or absolution of the said suspension, they shall be remitted to the ordinary of the place to be absolved and punished in due manner.* Lind. 191. Recoverable in the spiritual court; by the canon law, and by divers statutes.

By the statute of circumspecte agatis, 13 Ed. 1. ft. 4. *The king to his judges sendeth greeting: Use your selves circumspectly in all matters concerning the clergy, not punishing them if they hold plea in court christian, in the case where a parson doth demand of his parishioners oblations or tithes due and accustomed: In which case, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.*

Due and accustomed] *Debitas vel consuetas*: By this act, lord Coke says, *modus decimandi* and *real composition* are established [perhaps he had better have said, *distinguished*; for both of them were established long enough before this act:] for hereby tithes are divided into two parts, viz. tithes *due*, which is the tenth part; and tithes *accustomed*, which is a duty personal due by custom and usage to the parson in satisfaction of tithes, as a yearly sum of money, or other duty. And these are here called tithes *accustomed*; and for this *modus decimandi* the parson may sue in court christian, and is warranted by this act. 2 Inst. 490.

By the statute of articuli cleri, 9 Ed. 2. ft. 1. c. 1. *Whereas laymen do purchase prohibitions generally upon tithes, obventions, oblations, mortuaries; the king doth answer to this article, that in tithes, oblations, obventions, mortuaries (when they are propounded under these names) the king's prohibition shall hold no place, altho' for the long withholding of the same the money may be esteemed at a sum certain. But if a clerk, or a religious man, do sell his tithes being gathered in his barn, or otherwise, to any man for money, if the money be demanded before a spiritual judge, the king's prohibition shall lie; for by the sale, the spiritual goods are made temporal, and the tithes turned into chattels.*

By the 18 Ed. 3. ft. 3. c. 7. *Whereas writs of scire facias have been granted to warn prelates, religious, and other clerks, to answer dismes in our chancery, and to shew if they have any thing, or can any thing say, wherefore such dismes ought not to be restored to the said demandants, and to answer as well to us as to the party to such dismes; such writs from henceforth shall not be granted, and the process hanging upon such writs shall be annulled and* repealed,

Tithes.

repealed, and the parties dismissed from the secular judges of such manner of pleas.

Writs of scire facias] This is a writ, where one hath recovered debts or damages in the king's courts, and sueth not for execution within a year and a day; after which he shall have this writ, to warn the party; who coming not, or saying nothing to stay execution, a writ of *fieri facias* goes, commanding the sheriff to levy the debts or damages, of his goods. *Terms of the law.*

To warn prelates, religious, and other clerks] This *scire facias* was not brought against the possessors of the land for subtraction of tithes, but against the prelates or other clerks, which took the tithes after they were severed. Commissions out of the chancery were directed to certain persons, giving them authority to inquire, whether such a spiritual person ought to have tithes of such lands; whereupon inquisitions were taken and returned: and if it were found for the spiritual person, upon this record he might have a *scire facias* against any prelate, religious, or other clerk, that took them after severance. 2 *Inst.* 640.

By the 1 R. 2. c. 13. *The prelates and clergy of this realm do greatly complain them, for that the people of holy church, pursuing in the spiritual court for their tithes and their other things, which of right ought and of old times were wont to pertain to the same spiritual court; and that the judges of holy church, having cognizance in such causes, and other persons thereof meddling according to the law, be maliciously and unduly for this cause indicted, imprisoned, and by secular power horribly oppressed, and also enforced with violence by oaths and grievous obligations and many other means unduly compelled to desist and cease utterly of the things aforesaid, against the liberties and franchises of holy church: Wherefore it is assented, that all such Obligations made or to be made by duress or violence shall be of no value. And as to those that by malice do procure such indictments, and to be the same indictors, after the same indictments be so acquit; such procurers shall suffer a year's imprisonment, and restore to the parties their damages, and shall nevertheless make a grievous fine unto the king. And the justices of assize, or other justices, before whom such indictments shall be acquit, shall have power to inquire of such procurers and indictors, and duly to punish them according to their desert.*

By the 1 R. 2. c. 14. *At what time that any person of the holy church be drawn in plea in the secular court, for his own tithes taken by the name of goods taken away; and he which is so drawn in plea maketh an exception, or alledgeth, that the substance and suit of the business is only upon tithes due of right and of possession to his church or other his benefice: in such case the general averment shall not be taken, without shewing specially how the same was his lay chattel.*

By the 27 H. 8. c. 20. when by the noise of the dissolution of monasteries in this parliament, laymen took occasion upon trifling pretences to withdraw their tithes, it was enacted as followeth: *Forasmuch as divers evil disposed persons, inhabited in sundry counties cities towns and places of this*

this realm, having no respect to their duties to almighty god, but against right and good conscience having attempted to subtraēt and withhold in some places the whole and in some places great part of their tithes and oblations, as well personal as prædial, due unto god and holy church; and pursuing such their detestable enormities and injuries, have attempted in late time past to disobey and contemn the process laws and decrees of the ecclesiastical courts of this realm, in more temerarious and large manner than before this time hath been seen: for reformation of which said injuries, and for unity and peace to be preserved amongst the king's subjects of this realm, our sovereign lord the king, being supreme head on earth (under god) of the church of England, willing the spiritual rights and duties of that church to be preserved, continued and maintained, hath ordained and enacted by authority of this present parliament, That every of his subjects of this realm, according to the ecclesiastical laws and ordinances of his church of England, and after the laudable uses and customs of the parish or other place where he dwelleth or occupieth, shall yield and pay his tithes and offerings and other duties of holy church; and that for such subtractions of any the said tithes and offerings or other duties, the parson vicar curate or other party in that behalf grieved, may by due process of the king's ecclesiastical laws of the church of England, convent the person offending, before his ordinary or other competent judge of this realm having authority to hear and determine the right of tithes, as also to compel the same person offending to do and yield his duty in that behalf: And in case the ordinary of the diocese or his commissary, or the archdeacon or his official, or any other competent judge aforesaid, for any contempt contumacy disobedience or other misdemeanor of the party defendant, shall make information and request to any of the king's most honourable council, or to the justices of the peace of the shire where such offender dwelleth, to assist and aid the same ordinary commissary archdeacon official or judge, to order or reform any such person in any cause before rehearsed; that then he of the king's said honourable council, or such two justices of the peace (whereof one to be of the quorum), to whom such information or request shall be made, shall have power to attach or cause to be attached the person against whom such information or request shall be made, and to commit him to ward, there to remain without bail or mainprize, until he shall have found sufficient surety to be bound by recognizance or otherwise before the king's said counsellor or justice of the peace, or any other like counsellor or justice of the peace, to the use of our said lord the king, to give due obedience to the process proceedings decrees and sentences of the ecclesiastical court of this realm wherein such suit or matter for the premisses shall depend or be; and that every of the king's said counsellors, or two justices of the peace whereof the one to be of the quorum as is aforesaid, shall have power to take and record such recognizances and obligations. §. 1.

Provided, that this shall not extend to any inhabitant of the city of London, concerning any tithe offering or other ecclesiastical duty, grown and due to be paid within the said city; because there is another order made for the payment of tithes and other duties within the said city. §. 2.

Provided also, that all persons, being parties to any such suit, may have their lawful action demand or prosecution, appeals, prohibitions, and all other their lawful defences and remedies in every such suit, according to the

said ecclesiastical laws, and laws and statutes of this realm, in as ample manner as they might have had if this act had not been made. f. 3.

Shall have power to attach] In the case of *K. and Sanchee, H. 9 W.* when several quakers had been committed upon this statute, it was alleged, that the jurisdiction of the spiritual court was taken away by the act of parliament which gives the parson a remedy to recover such tithes by distress, by warrant of a justice of the peace: But by the court, the said act seems only to be an accumulative remedy, and not to repeal the former act of the 27 *H. 8.* *L. Raym. 323.*

By the 32 *H. 8. c. 7.* (which was also made upon occasion of the dissolution of monasteries, and which was chiefly intended to enable laymen, that by the dissolution had estates or interests in parsonages, or vicarages impropriate, or otherwise in tithes, to sue for subtraction of tithes in the ecclesiastical courts,) it is enacted as followeth: *Where divers persons inhabiting in sundry countries and places of this realm, not regarding their duties to almighty god and to the king our sovereign lord, but in few years past more contemptuously and commonly presuming to offend and infringe the good and wholesome laws of this realm and gracious commandments of our sovereign lord, than in times past hath been seen or known, have not letted to subtract and withdraw the lawful and accustomed tithes of corn hay pasturages and other sort of tithes and oblations, commonly due to the owners proprietaries and possessors of the parsonages vicarages and other ecclesiastical places within this realm; being the more encouraged thereto, for that divers of the king's subjects, being lay persons, having parsonages vicarages and tithes to them, and their heirs, or to the heirs of their bodies, or for term of life or years, cannot by the order and course of the ecclesiastical laws of this realm sue in any ecclesiastical court for the wrongful withholding and detaining of the said tithes or other duties, nor can by the order of the common laws of this realm have any due remedy against any person, his heirs or assigns, that wrongfully detaineth or withholdeth the same; by occasion whereof much controversy suit and variance is like to ensue among the king's subjects, to the great damage and decay of many of them, if convenient and speedy remedy be not provided: It is therefore enacted, that all persons of this realm, of what estate degree or condition soever they be, shall fully truly and effectually divide set-out yield or pay, all and singular tithes and offerings aforesaid, according to the lawful customs and usages of parishes and places, where such tithes or duties shall arise or become due; and if any person, of his ungodly and perverse will, shall detain and withhold any of the said tithes or offerings or any part thereof, then the person or persons, being ecclesiastical or lay, having cause to demand the said tithes or offerings, being thereby wronged or grieved, shall and may convent the person so offending, before the ordinary, his commissary, or other competent minister or lawful judge of the place where such wrong shall be done, according to the ecclesiastical laws; and in every such cause or matter of suit, the same ordinary or other judge, having the parties or their lawful procurators before him, shall proceed to the examination hearing and determination of every such cause or matter,*

matter, ordinarily or summarily, according to the course and process of the said ecclesiastical laws, and thereupon give sentence accordingly. §. 1, 2.

And if any of the parties shall appeal from the sentence, order, and definitive judgment of the said ordinary or other competent judge as aforesaid; then the same judge shall, upon such appellation made, adjudge to the other party the reasonable costs of his suit therein before expended; and shall compel the same party appellant to satisfy and pay the same costs so adjudged, by compulsory process and censures of the said laws ecclesiastical; taking surety of the other party to whom such costs shall be adjudged and paid, to restore the same costs to the party appellant, if afterwards the principal cause of that suit of appeal shall be adjudged against the same party to whom the same costs shall be yielded: And so, every ordinary or other competent judge ecclesiastical shall adjudge costs to the other party, upon every appeal to be made in any suit or cause of subtraction or detention of any tithes or offerings, or in any other suit to be made concerning the duty of such tithes or offerings. §. 3.

And if any person, after such sentence definitive given against him, shall obstinately and wilfully refuse to pay his tithes or duties, or such sums of money so adjudged, wherein he shall be condemned for the same; it shall be lawful for two justices of the peace for the same shire, whereof one to be of the quorum, upon information certificate or complaint to them made in writing by the said ecclesiastical judge that gave the same sentence, to cause the same party so refusing to be attached and committed to the next gaol, and there to remain without bail or mainprise, till he shall have found sufficient sureties to be bound by recognizance or otherwise, before the same justices, to the use of our lord the king, to perform the said definitive sentence and judgment. §. 4.

Provided, that no person shall be sued or otherwise compelled to pay any tithes, for any manors lands tenements or other hereditaments, which by the laws or statutes of this realm are discharged or not chargeable with the payment of any such tithes. §. 5.

Provided also, that this shall not in any wise bind the inhabitants of the city of London and suburbs of the same, to pay their tithes and offerings within the same city and suburbs, otherwise than they ought to have done before. §. 6.

And in all cases where any person shall have any estate of inheritance, freehold, term, right, or interest in any parsonage, vicarage, portion, pension, tithes, oblations, or other ecclesiastical or spiritual profit, which shall be made temporal or admitted to be in temporal hands and lay uses and profits by the laws or statutes of this realm, shall be disseised deforced wronged or otherwise kept or put from their lawful inheritance, estate, seisin, possession, occupation, term, right, or interest therein, by any other person claiming to have interest in or title to the same; the person so disseised deforced or wrongfully kept or put out, his heirs, his wife, and such other to whom such injury and wrong shall be done, may have their remedy in the king's temporal courts, or other temporal courts, as the case shall require, for the recovery or obtaining of the same, by writs original of præcipe quod reddat, assize of novel disseisin, mortdancestor, quod ei deforceat, writs of dower, or other writs original, as the case shall require, to be devised and granted in the king's court of chancery, in like manner and form as they might have had for lands tenements or other

other hereditaments in such manner to be demanded: and writs of covenant and other writs for fines to be levied, and all other assurances to be had of the same, shall be granted in the said chancery, according as hath been used for fines to be levied and assurance to be had of lands tenements or other hereditaments. Provided, that this shall not give any remedy, cause of action or suit, in the courts temporal, against any person who shall refuse to set out his tithes, or shall withhold or refuse to pay his tithes or offerings; but that in all such cases the party, being ecclesiastical or lay, having cause to demand or have the said tithes or offerings, and thereby wronged or grieved, shall have his remedy for the same in the spiritual courts, according to the ordinance in the first part of this act mentioned, and not otherwise. f. 7, 8.

Recovery of
treble value
in the tempo-
ral courts, by
the 2 & 3
Ed. 6.

6. By the 2 & 3 Ed. 6. c. 13. the aforesaid acts of the 27 H. 8. c. 20. and the 32 H. 8. c. 7. shall stand in full force: And moreover, it is further enacted as followeth; viz. *All persons shall truly and justly, without fraud or guile, divide set-out yield and pay all manner of the prædial tithes, in their proper kind, as they rise and happen, in such manner and form as hath been of right yielded and paid within forty years next before the making of this act, or of right or custom ought to have been paid; and no person shall take or carry away any such or like tithes, which have been yielded or paid within the said forty years, or of right ought to have been paid, in the place or places tithable of the same, before he hath justly divided or set forth for the tithe thereof the tenth part of the sume, or otherwise agreed for the same tithes with the parson, vicar, or other owner, proprietary, or farmer of the same tithes; under the pain of forfeiture of treble value of the tithes so taken or carried away.* f. 1.

Truly and justly, without fraud or guile] In the case of *Heale and Sprat*, T. 44 Eliz. In a prohibition: The case was, Heale did set out his prædial tithes, and divided them justly from the nine parts, and soon after carried the same away. Sprat sued for a subtraction of the same in the ecclesiastical court. Heale pleaded that he had set them out, as above. Whereunto Sprat said, that presently after his setting out, he carried the same away, to the defrauding of the statute. And it was adjudged, that this was fraud and guile within this act, albeit he did justly divide the same within the letter of this law. It was further resolved, that if the owner of the corn before severance grant the same to another, of intent that the grantee should take away the same, to the end to defraud the parson of his tithe; this is fraud and guile within this statute. 2 Inst. 649.

Prædial Tithes] This branch extends only to prædial tithes. Thus in the case of *Booth and Southraie*, E. 1 Jac. In debt upon this statute by the parson of the church, for not setting forth of the tithes of cheese, calves, lambs, cherries, and pears, to have the treble value; the defendant pleaded nihil debet, and it was found against him. And it was moved in arrest of judgment, that the said tithes of cheese, or calves, and lambs were not prædial tithes, and therefore not within this branch of the statute; and this act is penal, and shall not be taken by equity. Which was allowed by the whole court. 2 Inst. 649.

Within forty years next before the making of this act] This time of forty years is here set down, because forty years in the ecclesiastical court about tithes make a prescription. 2 Inst. 649. 1 Ought. 263.

Or of right or custom ought to have been paid] The sense of these words *of right ought to have been paid*, is of tithes to be yielded in specie within forty years; and the sense of the words *of right or custom*, is, by rightful custom de modo decimandi. 2 Inst. 650.

Under the pain of forfeiture of treble value of the tithes so taken or carried away] This branch doth not give the forfeiture to any person in certain; and therefore it was pretended, that the forfeiture should be given to the king: And thereupon, the attorney general, *H. 29 Eliz.* did exhibit an information in the exchequer, against one *Wood* a parishioner of Iclington in the county of Cambridge, for this treble forfeiture, for carrying away his tithes before they were justly divided. The defendant pleaded not guilty; and by a jury at the bar he was found guilty; and in arrest of judgment it was moved, that in this case the forfeiture was not given to the king, for that the words of the act be, *under the pain of forfeiture of treble value of the tithes so taken away*: and whensoever a forfeiture is given against him that doth dispossess the owner of his property, as here he doth of his tithes, there the forfeiture is given to the party grieved or dispossessed; and the rather for that this is an additional law, and made for the benefit of the proprietor of the tithes. And so it was adjudged by Manwood and the whole court of exchequer. And this was the first leading case that was adjudged upon this point; and ever since, it hath been received for law, that the party interested in the tithes shall in an action of debt recover the treble value. 1 Inst. 159. 2 Inst. 650.

And it is to be observed, that the treble value only, and not the tithes themselves, nor any satisfaction for them, may be recovered in the temporal court: that being out of the jurisdiction of those courts, and wholly in the spiritual court. Which is the reason why in all suits upon this statute, the action is not laid for subtraction of tithes but for a contempt of the statute in not setting them out. And being a contempt, the action dies with him who committed the contempt; and doth not lie against his executor. *Gibf. 697. 1 Vern. 60.*

And it hath been held, that an action grounded on this statute, for not setting forth of tithes, is not within the statute of limitations; that statute not extending to actions grounded on acts of parliament: therefore the plaintiff is not by law confined to six years, or to any other time certain, within which to bring his action. *Watsf. c. 58.*

Thus, in the case of *Marston and Cleypole, E. 1726*; on a bill by a lay impropiator for tithes in the court of exchequer, for about twenty four years; the defendant, as to such part of the bill as prayed discovery and relief for any time before within six years next before filing the bill or serving the subpoena, pleaded the statute of limitations, and that he did not promise to make any satisfaction for any tithes before the said six years; but it was over-ruled by the court; because the defendant, as to

tithes, is only in the nature of a receiver or bailiff for the plaintiff; in which case the statute of limitations doth not operate. *Bunb.* 213.

If a jury give a verdict for the plaintiff, they must find the real value of the tithes, which shall be trebled by the court; as if the jury find the real and single value to be twenty pounds, they ought to give the plaintiff only so much, and the court shall treble it, and make that sum given by the jury to be sixty pounds, which is the treble value. But if the issue be upon the custom of tithing, or any other collateral point, the jury then need not to find any value of the tithes; for that in such case the defendant shall pay the value expressed by the plaintiff in his declaration: because by the collateral matter pleaded in bar, the value of the tithes set forth in the declaration is confessed. Therefore in all actions brought upon this statute, if the defendant plead any collateral matter in bar of the action, he must take the value of the tithes mentioned in the declaration by protestation; that is, he must by the form of a protestation aver, that the tithes were not of that value as is declared; otherwise he will be charged with the value the plaintiff hath by his declaration set upon them. And the same law is said to be, if judgment be given for the plaintiff by *nihil dicit*, *non sum informatus*, or upon demurrer. *Watsf.* c. 58.

And neither damages nor costs can be recovered with the treble value; because the statute hath not expressly given them: except that by the statute of the 8 & 9 *W.* c. 11. it is enacted, that in all actions of debt upon the statute for not setting forth of tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles; the plaintiff obtaining judgment, or any award of execution after plea pleaded or demurrer joined therein, shall recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs. §. 3.

Recovery of double value in the ecclesiastical court, by the same statute.

7. By the aforesaid statute of the 2 & 3 *Ed.* 6. c. 13. At all times whensoever, and as often as any prædial tithes shall be due at the tithing of the same; it shall be lawful to every party to whom any of the said tithes ought to be paid, or his deputy or servant, to view and see their said tithes to be justly and truly set forth and severed from the nine parts; and the same quietly to take and carry away: and if any person carry away his corn or hay, or his other prædial tithes, before the tithe thereof be set forth; or willingly withdraw his tithes of the same, or of such other things whereof prædial tithes ought to be paid; or do stop or let the parson, vicar, proprietor, owner, or other their deputies or farmers, to view, take, and carry away their tithes as is abovesaid; by reason whereof the said tithe or tenth is lost, impaired or hurt: then upon due proof thereof made before the spiritual judge, or any other judge to whom heretofore he might have made complaint; the party so carrying away, withdrawing, letting, or stopping, shall pay the double value of the tenth or tithe so taken, lost, withdrawn, or carried away, over and besides the costs charges and expences of the suit in the same: The same to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws. §. 2.

Provided, that no person shall be sued or otherwise compelled to yield give or pay any manner of tithes, for any manors, lands, tenements, or hereditaments, which by the laws and statutes of this realm, or by any privilege or prescription, are not chargeable with the payment of any such tithes, or that be discharged by any composition real. s. 4.

Shall pay the double value] The reason why the double value is by this branch to be recovered in the ecclesiastical court, where by the former branch the parson at the common law shall recover the treble, is, for that in the ecclesiastical court he shall recover the tithes themselves; and therefore the value recovered in the ecclesiastical court is equivalent with the treble forfeiture at the common law. 2 Inst. 650.

And the double value, together with the statute, ought to be expressly mentioned in the libel: but yet the libel must be so ordered, as not to be grounded directly upon the statute for more than double value; for if the single damages, that is, the value of the tithes, be also grounded upon it, this will be interpreted a suing in the spiritual court for treble value; and a prohibition will lie. Godb. 245. Gibs. 697.

Over and besides the costs, charges, and expences] So as the suit in the ecclesiastical court is more advantageous, than the suit for the treble forfeiture at the common law. For at the common he shall recover no costs; but he shall recover in the ecclesiastical court his costs, charges, and expences. 2 Inst. 651.

8. And if any person do subtraēt or withdraw any manner of tithes, obventions, profits, commodities, or other duties (beforementioned), or any part of them, contrary to the true meaning of this act, or of any other act heretofore made; the party so subtraēting or withdrawing the same may be convented and sued in the king's ecclesiastical court, by the party from whom the same shall be subtraēted or withdrawn, to the intent the king's ecclesiastical judge may bear and determine the same, according to the king's ecclesiastical laws: And it shall not be lawful to the parson, vicar, proprietor, owner, or other their farmers or deputies, contrary to this act, to convent or sue such withholder of tithes, obventions, and other duties aforesaid, before any other judge than ecclesiastical. 2 & 3 Ed. 6. c. 13. s. 13.

Manner of suing for tithes in the ecclesiastical court.

And if any archbishop, bishop, chancellor, or other judge ecclesiastical, give any sentence in the foresaid causes of tithes, obventions, profits, emoluments, and other duties aforesaid, or in any of them (and no appeal or prohibition hanging), and the party condemned do not obey the said sentence; it shall be lawful to every such judge ecclesiastical, to excommunicate the said party so as aforesaid condemned and disobeying: In which sentence of excommunication, if the said party excommunicate wilfully stand and endure still excommunicate by the space of forty days next after, upon denunciation and publication thereof in the parish church or the place or parish where the party so excommunicate is dwelling or most abiding; the said judge ecclesiastical may then at his pleasure signify to the king in his court of chancery, of the state and condition of the said party so excommunicate, and thereupon require process de excommunicato capiēdo to be awarded against every such person as hath been so excommunicate. s. 13.

And if the party in such case shall sue for a prohibition; he shall, before any prohibition granted, deliver to some of the justices or judge of the court where he demandeth prohibition, a true copy of the libel, subscribed by his hand; and under the copy of the said libel shall be written the suggestion wherefore he demandeth the prohibition: And in case the said suggestion, by two honest and sufficient witnesses at least, be not proved true in the court where the said prohibition shall be so granted, within six months next following after the said prohibition shall be so granted and awarded; then the party that is letted or hindered of his suit in the ecclesiastical court by such prohibition, shall upon his request and suit, without delay, have a consultation granted by the same court; and shall also recover double costs and damages, against the party that so pursued the prohibition, to be assigned or assessed by the same court, for which costs and damages the party may have an action of debt. f. 14.

Provided, that nothing herein shall extend to give any minister or judge ecclesiastical, any jurisdiction to hold plea of any matter cause or thing, contrary to the statute of Westminster 2. c. 5. the statutes of articuli cleri, circumspecte agatis, sylva cædua, the treatise de regia prohibitionem, nor against the statute of 1 Ed. 3. c. 10; nor to hold plea in any matter, whereof the king's court of right ought to have jurisdiction. f. 15.

S. 13. *May be convented*] In the case of Machin and Molton, E. 11 W: It was moved for the discharge of a rule by which a prohibition was granted unless cause shewed, to the consistory court of the archbishop of York; where Molton, rector of the church of South Collingham in the diocese of York, preferred a libel against Machin for subtraction of tithes. And the motion for the prohibition was grounded upon a suggestion, that Machin lived within the diocese of Lincoln, and therefore ought not to be cited out of the diocese where he lived, by the 23 H. 8. c. 9. And the cause which was shewed to the court to discharge the rule was, because Machin had lands within the diocese of York, namely, in the parish of South Collingham; for the tithes of corn growing upon which lands, Molton libelled in the consistory court of York; and when the citation was served, Machin was there, tho' he lived generally within the diocese of Lincoln. And by Holt chief justice; if a man lives within the diocese of A, and occupies lands in the diocese of B, if he subtracts tithes in B, he may be cited and sued there; and it is not within the said statute: for when he occupies lands in B, that makes him an inhabitant there, and out of the intent of the statute; and by the statute of the 32 H. 8. c. 7. f. 2. the suit for withholding of tithes in express words is appointed to be, before the ordinary of the place where the wrong was done. L. Raym. 452, 534.

Or the place or parish] It seemeth that the words should be, of the place or parish.

S. 14. *By two honest and sufficient witnesses at least*] This clause was made in favour of the clergy, for proof to be made by witnesses; which they had not at the common law. But if the suggestion be in the neg-

tive, as if the proprietary of a parsonage impropriate sue for tithes, and the cause of the suggestion be, that the parsonage is not impropriate; or if a parson sue for tithes of lands in his parish, and the party sue for a prohibition for that the land lieth not in that parish, or that the parson that sueth for tithes was not inducted, or any the like cause in the negative of any matter of fact; he shall not produce any witnesses by force of this branch, because a negative cannot be proved: and therefore a prohibition upon causes in the negative remains as it was at the common law. 2 Inst. 662.

Proved true] It is sufficient in this case that enough is proved, upon which to ground a prohibition, tho' the suggestion be not shewn to be strictly and wholly true. So where the suggestion was for twenty acres of pasture and as many acres of wood in lieu of tithes, and proof was only made of the wood; or where the suggestion was for wool and lamb, and the witnesses only proved as to the lamb; or for a hundred acres, when there were only sixty; or for twenty shillings by way of modus, where the sum was forty shillings: in these cases, the proofs were adjudged to be sufficient, because enough was proved to shew, that the court christian ought not to hold plea thereof. But if proof is neither made of the modus laid, nor of any other modus; then the suggestion is not proved. *Gibbs*. 699.

As to the clearness of the evidence, it is sufficient in this case, if the witnesses do declare as to the matter of the suggestion, that they believe it, or have known it so, or have heard it, or that there is a common fame of it. *Gibbs*. 699.

Within six months] If there is no certainty in the first proof, it cannot be supplied by good proof after the six months; but if good proof is made within the time, it may be certified after the time. *Gibbs*. 700.

Six months] That is, six kalendar months; and not to be reckoned by twenty eight days to the month. 2 *Salk*. 554.

Six months next following] Which must be computed from the teste of the writ; and not six months in the term time only, but the vacation shall be included as part of the time. 2 *Salk*. 554. *L. Raym*. 1172.

Have a consultation granted] After which, the party may have a new prohibition upon the same libel; inasmuch as the statute of the 50 *Ed*. 3. against prohibition after consultation, extends not to those consultations for defect of proof within six months, but only to consultations which are granted upon the matter of the suggestion. *Gibbs*. 700.

S. 15. *Contrary to the statute of Westminster the second*] Concerning the writ of *Indicavit*, given by that statute. 2 *Inst*. 663.

The statutes of articuli cleri, circumspecte agatis, sylvæ cædua] All which, with respect unto tithes, are specified in this title.

The treatise de regia prohibitionem] Which is that which is intitled *Prohibitio formata super articulis*. Vet. Magn. Chart. part 2. fol. 7. 2 Inst. 663.

Nor against the statute of the 1 Ed. 3. c. 10.] This is misprinted; for the act is 1 Ed. 3. st. 2. c. 11. that if any suit be in the spiritual court against indictors, a prohibition doth lie. 2 Inst. 663.

Suit for small
tithes before
justices of the
peace.

9. By the 7 & 8 W. c. 6. *For the more easy and effectual recovery of small tithes, and the value of them, where the same shall be unduly subtracted and detained, where the same do not amount to above the yearly value of forty shillings from any one person; it is enacted, that all persons shall well and truly set out and pay all and singular the tithes commonly called small tithes, and compositions and agreements for the same, with all offerings oblations and obventions, to the several rectors vicars and other persons to whom they shall be due in their several parishes, according to the rights customs and prescriptions commonly used within the said parishes respectively: And if any person shall subtract or withdraw, or any ways fail in the true payment of such small tithes offerings oblations obventions or compositions, by the space of twenty days at most after demand thereof; it shall be lawful for the person to whom the same shall be due, to make his complaint in writing to two or more justices of the peace, within that county place or division where the same shall grow due, neither of which justices is to be patron of the church or chapel whence the said tithes shall arise, nor any ways interested in such tithes offerings oblations obventions or compositions aforesaid.* s. 1.

And on such complaint, the said justices shall summon in writing under their hands and seals, by reasonable warning, every such person against whom such complaint shall be made; and after his appearance, or upon default of appearance, the said warning or summons being proved before them upon oath, the said justices shall proceed to hear and determine the said complaint, and upon the proofs evidences and testimonies produced before them, shall in writing under their hands and seals adjudge the case, and give such reasonable allowance and compensation for such tithes oblations and compositions so subtracted or withheld as they shall judge to be just and reasonable, and also such costs and charges not exceeding ten shillings as upon the merits of the cause shall appear just. s. 2.

And if any person shall refuse or neglect, for the space of ten days after notice given, to pay or satisfy any such sum of money, as upon such complaint and proceeding shall by two such justices be adjudged as aforesaid; in every such case the constables and churchwardens of the said parish, or one of them, shall by warrant under the hands and seals of the said justices to them directed, distrain the goods and chattels of the party so refusing or neglecting as aforesaid; and after detaining them [not less than four days, nor more than eight, 27 G. 2. c. 20.] in case the said sum so adjudged together with reasonable charges of making and detaining the said distress be not tendered or paid by the said party in the mean time, shall make publick sale thereof, and pay to the party complaining so much of the money arising by such sale, as may satisfy the said sum so adjudged, retaining to themselves such reasonable charges for making and keeping the said distress as the said justices shall think fit

fit [and also deducting their reasonable charges of selling the said distress; returning the overplus (if any shall be) to the owner upon demand: 27 G. 2. c. 20.] §. 3.

And the said justices shall have power to administer an oath. §. 4.

Provided, that this act shall not extend to any tithes, oblations, payments, or obventions, within the city of London or liberties thereof; nor to any other city or town corporate where the same are settled by act of parliament. §. 5.

And no complaint shall be heard and determined by the said justices, unless the complaint shall be made within two years next after the times that the same tithes, oblations, obventions, and compositions did become due. §. 6.

Provided also, that any person finding himself aggrieved by any judgment to be given by such two justices, may appeal to the next general quarter sessions to be held for that county or other division; and the justices there shall proceed finally to hear and determine the matter; and to reverse the said judgment, if they shall see cause; and if they shall find cause to confirm the said judgment, they shall decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall seem just and reasonable. And no proceedings or judgment had by virtue of this act, shall be removed or superseded by any writ of certiorari or other writ out of his majesty's courts at Westminster or any other court, unless the title of such tithes oblations or obventions shall be in question. §. 7.

Provided, that where any person complained of for subtracting or withholding any small tithes or other duties aforesaid, shall before the justices to whom such complaint is made, insist upon any prescription, composition, or modus decimandi, agreement, or title, whereby he ought to be freed from payment of the said tithes or other dues in question, and deliver the same in writing to the said justices subscribed by him; and shall then give to the party complaining, reasonable and sufficient security to the satisfaction of the said justices, to pay all such costs and damages, as upon a trial at law to be had for that purpose in any of his majesty's courts having cognizance of that matter shall be given against him, in case the said prescription composition or modus decimandi shall not upon the said trial be allowed; in that case, the said justices shall forbear to give any judgment in the matter, and then and in such case, the party complaining shall be at liberty to prosecute such person for his said subtraction, in any other court where he might have sued before the making of this act. §. 8.

And every person who shall by virtue of this act obtain any judgment, or against whom any judgment shall be obtained, before any justices of the peace out of sessions, for small tithes oblations obventions or compositions, shall cause or procure the said judgment to be inrolled at the next general quarter session to be held for the said county or other division; and the clerk of the peace shall upon tender thereof inroll the same, and shall not receive for the inrollment of any one judgment any fee or reward exceeding one shilling; and the judgment so inrolled, and satisfaction made by paying the sum adjudged, shall be a good bar to conclude the said rectors vicars and other persons, from any other remedy for the said small tithes oblations obventions or compositions, for which the said judgment was obtained. §. 9.

And

And if any person against whom such judgment shall be had, shall remove out of the county or other division before the levying of the sum adjudged; the justices who made the judgment, or one of them, shall certify the same under hand and seal to any justice of such other county or place wherein the said person shall be an inhabitant; who shall, by warrant under his hand and seal, to be directed to the constables or churchwardens of the place or one of them, levy the sum so adjudged to be levied, upon the goods and chattels of such person, as fully as the said other justices might have done, if he had not removed as aforesaid. §. 10.

And the justices who shall hear and determine any of the matters aforesaid, shall have power to give costs, not exceeding ten shillings, to the party prosecuted, if they shall find the complaint to be false and vexatious; to be levied in manner and form aforesaid. §. 12.

And if any person shall be sued for any thing done in the execution of this act, and the plaintiff in such suit shall discontinue his action, or be non-suit, or a verdict pass against him; such person shall recover double costs. §. 13.

Provided, that any clerk or other person, who shall begin any suit for recovery of small tithes, oblations, or obventions, not exceeding the value of forty shillings, in his majesty's court of exchequer, or in any the ecclesiastical courts, shall have no benefit by this act for the same matter for which he hath sued. §. 14.

Suit for
quakers tithes
before justices
of the peace.

10. By the 7 & 8 W. c. 34. Whereas by reason of a pretended scruple of conscience, quakers do refuse to pay tithes and church rates; it is enacted, that where any quaker shall refuse to pay or compound for his great or small tithes, or to pay any church rates, it shall be lawful for the two next justices of the peace of the same county (other than such justice as is patron of the church or chapel whence the said tithes shall arise, or any ways interested in the said tithes), upon the complaint of any parson, vicar, farmer, or proprietor of tithes, churchwarden or churchwardens, who ought to have receive or collect the same, by warrant under their hands and seals, to convene before them such quaker or quakers neglecting or refusing to pay or compound for the same, and to examine upon oath (or affirmation, in case of the examination of a quaker) the truth and justice of the said complaint, and to ascertain and state what is due and payable; and by order under their hands and seals to direct and appoint the payment thereof, so as the sum ordered do not exceed ten pounds: and upon refusal to pay according to such order, it shall be lawful for any one of the said justices, by warrant under his hand and seal, to levy the same by distress and sale of the goods of such offender, his executors or administrators, rendering only the overplus to him or them, the necessary charges of distraining being thereout first deducted and allowed by the said justice. And any person finding himself aggrieved by any judgment given by such two justices, may appeal to the next general quarter sessions to be held for the county, riding, city, liberty, or town corporate; and the justices there shall proceed finally to hear and determine the matter, and to reverse the said judgment, if they see cause; and if they shall find cause to continue the said judgment, they shall then decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall seem just and

and reasonable. And no proceedings or judgment had by virtue of this act, shall be removed or superseded by any writ of certiorari or other writ out of his majesty's courts at Westminster, or any other court whatsoever, unless the title of such tithes shall be in question. s. 4.

Provided, that in case any such appeal be made as aforesaid, no warrant of distress shall be granted, until after such appeal be determined. s. 5.

And by the 1 G. st. 2. c. 6. The like remedy shall be had against any quaker or quakers, for the recovering of any tithes or rates, or any customary or other rights dues or payments, belonging to any church or chapel, which of right by law and custom ought to be paid, for the stipend or maintenance of any minister or curate officiating in any church or chapel; and any two or more justices of the peace of the same county or place (other than such justice as is patron of any such church or chapel or any ways interested in the said tithes), upon complaint of any parson vicar curate farmer or proprietor of such tithes, or any churchwarden or chapelwarden, or other person who ought to have receive or collect any such tithes rates dues or payments as aforesaid, are authorized and required to summon in writing under their hands and seals, by reasonable warning, such quaker or quakers, against whom such complaint shall be made; and after his or their appearance, or upon default of appearance, the said warning or summons being proved before them upon oath, to proceed to hear and determine the said complaint; and to make such order therein as in the aforesaid act is limited; and also to order such costs and charges as they shall think reasonable, not exceeding ten shillings, as upon the merits of the cause shall appear just: which order shall and may be so executed, and on such appeal may be reversed or affirmed by the general quarter sessions, with such costs and remedy for the same; and shall not be removed into any other court, unless the titles of such tithes dues or payments shall be in question; in like manner as by the aforesaid act is limited and provided. s. 2.

And by the 27 G. 2. c. 20. which directeth in what manner distresses shall be made by justices of the peace, and which gives to the justices power to order the goods distrained to be kept for a certain time before they be sold, and gives power also to the officers making the distress to deduct their reasonable charges, it is provided, that the same shall not extend to alter any provisions relating to distresses to be made for the payment of tithes and church rates by the people called quakers, contained in the acts of the 7 & 8 W. c. 34. and the 1 G. st. 2. c. 6.

In the case of the King against Roger Wakefield and others, H. 31 G. 2. An order of two justices was made against three persons being quakers, on the 1 G. st. 2. c. 6. for the payment of certain customary payments, called Chapel Salary, to the reverend Mr Smith, curate of the chapel of Burnside in Westmorland, where the said quakers had estates chargeable with the said payments. On appeal to the sessions, the order was confirmed. The quakers moved for a certiorari, and tho' cause was shewn against the issuing of it, yet a certiorari was granted; and the return was filed, and exceptions were taken to it, and argued to the bar. Lord Mansfield chief justice delivered the opinion of the court: That the certiorari ought not to have issued at all; that the return should be taken off the file, and all proceedings thereon fall to the ground, and that the

orders of the justices and sessions should be remanded. The order of the justices (he observed) was made on the statute of the 1 G. 2. c. 6. which extends the 7 & 8 W. c. 34. concerning tithes, to all customary payments due to clergymen. These two acts are to be taken together as one law. They were intended for the benefit of the quakers; to prevent their being liable to expensive suits for refusing to pay tithes upon scruples of conscience, by giving an apparent compulsory method of levying tithes and other customary payments in a summary way. This proceeding cannot be removed by certiorari, unless the title to these customary payments comes in question: And on this proviso the present question arises. The affidavits read on the original motion for the certiorari set forth, that before the justices and the sessions the defendants controverted the right of the curate to these customary payments. The affidavits against the certiorari say, that these payments have been paid from time immemorial; that no inhabitant ever disputed it but these quakers; that they have enjoyed the messuages but a few years, and that the former inhabitants never disputed the right of the parson. Taking these affidavits together, it is clear that the quakers controverted the right to the customary only as all quakers controvert the payment of all dues to all clergymen upon scruple of conscience, which is the case directly within the act, and the proceeding must therefore follow the directions of the act. The quakers themselves have acknowledged the jurisdiction of the justices, by appealing to the sessions; whereas had they intended to dispute the title to these customary payments, they would at first have removed the order of two justices by certiorari. The only difficulty remaining arises from the return being already filed. But there are several instances of this court's superseding a certiorari after the return filed: As where an order of justices is removed, and it appears upon the return, that the parties had a right to appeal to the sessions, and that the time for appealing was not expired when the certiorari issued; in such a case, this court supersedes the writ of certiorari, *quia improvide emanavit*. The same must be done in the present case.

Tithes severed
to be sued for
in the tem-
poral courts
only.

11. Tithes being set out, or severed from the nine parts, become lay chattels. Upon which foundation, when the tithe of corn was set out in sheaves, and the parson would not take it, but prayed remedy in the spiritual court, a prohibition was granted. And when a sequestration was prayed in the temporal courts, of tithes not set out, the right of which was in controversy, the party was told, his request had been reasonable, if they had been severed from the nine parts. For the same reason, if after severance they are carried away by a stranger, the remedy is in the temporal courts; but otherwise if they are carried away by the owner: because his setting them out, in order to carry them away, is a fraudulent setting out. *Gibbs*. 689.

And judgment of præmunire hath been given against a man, for suing in the spiritual court for tithes, alledging the same to be severed from the nine parts. 3 *Inst.* 121.

12. Notwithstanding all these statutes, tithes (if of any considerable value) are now generally sued for in the courts of equity by english bill, in the courts and for the most part in the exchequer chamber; but not upon the statute of equity. for treble or double value: for there can be no suit in equity for the recovery of the double or treble value. *Wood b. 2. c. 2. 2 P. Will. 463. Vin. Difmes. M. b.*

13. If the incumbent dieth, his executor may recover the tithes which became due in the testator's life time; but he is not intitled to the treble value upon the statute. *1 Vern. 60.*

M. 1730. In the exchequer: A rector agreed with his parishioner for tithes, for a certain sum payable yearly at Michaelmas. The rector died about a month before Michaelmas. The agreement determining by the death of the parson, the successor shall be intitled to tithes in kind only from the death, and the executor of the last incumbent to a proportion according to the agreement till the time of the testator's death: and this is by an equitable construction. *Bunb. 294.*

By the statute of the 11 G. 2. c. 19. *Whereas, where a lessor or landlord having only an estate for life in the lands tenements or hereditaments demised, happens to die before or on the day on which any rent is reserved or made payable, such rent or any part thereof is not by law recoverable by the executors or administrators of such lessor or landlord; nor is the person in reversion intitled thereto, any other than for the use and occupation of such lands tenements or hereditaments from the death of the tenant for life; of which, advantage hath been often taken by the under-tenants, who thereby avoid paying any thing for the same: for remedy thereof, it is enacted, that where any tenant for life shall happen to die, before or on the day on which any rent was reserved or made payable, upon any demise or lease of any lands tenements or hereditaments, which determined on the death of such tenant for life; the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant of such lands tenements or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due as aforesaid; making all just allowances, or a proportionable part thereof respectively. s. 15.*

VIII. Tithes in London.

In the several acts of the 27 H. 8. c. 20. 32 H. 8. c. 7. 2 & 3 Ed. 6. c. 13. and 7 & 8 W. c. 6. there is a proviso, that nothing therein shall extend to the city of London, concerning any tithe, offering, or other ecclesiastical duty, grown and due to be paid within the said city; because there is another order made, for the payment of tithes and other duties there.

Which order is as followeth: It appeareth by the records of the city of London, that Niger bishop of London, in the 13 Hen. 3. made a constitution, in confirmation of an ancient custom formerly used time out

of mind, that provision should be made for the ministers of London in this manner; that is to say, that he who paid the rent of 20s for his house wherein he dwelt, should offer every sunday, and every apostle's day whereof the evening was fasted, one halfpenny; and he that paid but 10s. rent yearly, should offer but one farthing: all which amounted to the proportion of 2s 6d in the pound; for there were 52 sundays, and 8 apostles days the vigils of which were fasted. And if it chanced that one of the apostles days fell upon a sunday, then there was but one halfpenny or farthing paid; so that sometimes it fell out to be somewhat less than 2s 6d in the pound.

And it appears by the book cases in the reign of Edward the third, that the provision made for the ministers of London, was by offerings and obventions; albeit the particulars are not assigned there, but must be understood according to the former ordinance made by Niger.

And the payment of 2s 6d in the pound continuing until the 13 Ric. 2. Arundel archbishop of Canterbury made an explanation of Niger's constitution, and thrust upon the citizens of London two and twenty more saint days than were intended by the constitution made by Niger; whereby the offerings now amounted unto the sum of 3s 5d in the pound. And there being some reluctance by the citizens of London, pope Innocent in the 5 Hen. 4. granted his bull, whereby Arundel's explanation was confirmed. Which confirmation (notwithstanding the difference between the ministers and citizens of London, about those two and twenty saint days which were added to their number) pope Nicholas also by his bull did confirm in the 31 Hen. 6.

Against which the citizens of London did contend with so high a hand, that they caused a record to be made, whereby it might appear in future ages, that the order of explanation made by the archbishop of Canterbury was done without calling the citizens of London unto it, or any consent given by them. And it was branded by them as an order surreptitiously and abruptly obtained, and therefore more fit to have the name of a destructive than a declaratory order.

Nevertheless, notwithstanding this contention, the payment seemeth to have been most usually made according to the rate of 3s 5d in the pound. For Lindwood who writ in the time of Hen. 6. in his provincial constitutions debating the question, whether the merchants and artificers of the city of London ought to pay any tithes, sheweth, that the citizens of London, by an ancient ordinance observed in the said city, are bound every lord's day and every principal feast day either of the apostles or others whose vigils are fasted, to pay one farthing for every 10s rent that they paid for their houses wherein they dwelt.

And in the 36 Hen. 6. there was a composition made between the citizens of London, and the ministers, that a payment should be made by the citizens according to the rate of 3s 5d in the pound: and if any house were kept in the proper hand of the owner, or were demised without reservation of any rent; then the churchwardens of the parish where the houses were, should set down a rate of the houses, and according to that rate payment should be made.

After which composition so made, there was an act of common council made in the 14 Edw. 4. in London, for the confirmation of the bull granted by pope Nicholas.

But the citizens of London finding that by the common laws of the realm, no bull of the pope, nor arbitrary composition, nor act of common council could bind them in such things as concerned their inheritance; they still wrestled with the clergy, and would not condescend to the payment of the said 11 d by the year, obtruded upon them by the addition of the two and twenty saint days: whereupon there was a submission to the lord chancellor and divers others of the privy council in the time of king Hen. 8; and they made an order for the payment of tithes according to the rate of 2s 9d in the pound; which order was first promulgated by a proclamation made, and afterwards established by an act of parliament made in the 27 H. 8. c. 21. intituled, "An act for the payment of tithes within the city and suburbs of London, until another law and order shall be made and published for the same." *Privilegia Londini.* 456, 7, 8.

And ten years after this another law and order was made, by the statute of the 37 H. 8. c. 12. as followeth: Where of late time, contention strife and variance hath risen and grown, within the city of London and the liberties of the same, between the parsons vicars and curates of the said city and the citizens and inhabitants of the same, for and concerning the payment of tithes oblations and other duties within the said city and liberties; for appeasing whereof, a certain order and decree was made thereof, by the most reverend father in god Thomas archbishop of Canterbury, Thomas Audley, knight, lord Audley of *Walden*, and then lord chancellor of *England* now deceased, and other of the king's most honourable privy council; and also the king's letters patents and proclamation was made thereof, and directed to the said citizens concerning the same; whereupon it was after enacted in the parliament holden at Westminster by prorogation the fourth day of February in the twenty-seventh year of the king's most noble reign, that the citizens and inhabitants of the same city should, at Easter then next following, pay unto the curates of the said city and suburbs, all such and like sums of money, for tithes oblations and other duties, as the said citizens and inhabitants by the order of the said late lord chancellor, and other the king's most honourable council, and the king's said proclamation, paid or ought to have paid by force and virtue of the said order at Easter in the year 1535; and the same payments so to continue from time to time, until such time as any other order or law should be made by the king and the two and thirty persons by the king to be named, as well for the full establishment concerning the payment of all tithes oblations and other duties of the inhabitants within the said city suburbs and liberties of the same, as for the making of other ecclesiastical laws of this realm of England; and that every person denying to pay as is aforesaid, should by the commandment of the mayor of London for the time being, be committed to prison, there to remain until such time as he should have agreed with the curate for his said tithes oblations and other duties as is aforesaid, as in the said act more plainly

plainly appeareth: since which act, divers variances contentions and strifes are newly risen and grown, between the said parsons vicars and curates and the said citizens and inhabitants, touching the payment of the tithes oblations and other duties, by reason of certain words and terms specified in the said order, which are not so plainly and fully set forth, as is thought convenient and meet to be; for appeasing whereof, as well the said parsons vicars and curates, as the said citizens and inhabitants, have compromised and put themselves to stand to such order and decree touching the premises, as shall be made by the said right reverend father in god and the several other persons here under mentioned, for a final end and conclusion to be had and made touching the premises for ever: And to the intent to have a full peace and perfect end between the said parties, their heirs and successors, touching the said tithes oblations and other duties for ever, it is enacted, that such end order and direction as shall be made by the forenamed archbishop and the several other persons as aforesaid, or any six of them, before the first day of March next ensuing, concerning the payment of tithes oblations and other duties within the said city and the liberties thereof, and inrolled of record in the high court of chancery, shall stand remain and be as an act of parliament, and shall bind as well all citizens and inhabitants of the said city and liberties for the time being, as the said parsons vicars curates and their successors for ever, according to the effect purport and intent of the said order and decree so to be made and inrolled; and that every person denying to pay any of his tithes oblations or other duties, contrary to the said decree so to be made, shall by the commandment of the mayor of London for the time being, and in his default or negligence by the lord chancellor of England for the time being, be committed to prison, there to remain till such time as he hath agreed with the curate for the same.

Which decree made in pursuance hereof is as followeth: viz.

(1) *As touching the payment of tithes in the city of London, and the liberties of the same, It is fully ordered and decreed by the most reverend father in god Thomas archbishop of Canterbury primate and metropolitan of England, Thomas lord Wrythesly lord chancellor of England, William lord St. John president of his majesty's council and lord great master of his majesty's household, John lord Ruffel lord privy seal, Edward earl of Hertford lord great chamberlain of England, John viscount Lisle high admiral of England, Richard Lister knight chief justice of England, and Roger Cholmely knight chief baron of his majesty's exchequer, this twenty-fourth day of February in the year of our lord 1545, according to the statute in such case lately provided, that the citizens and inhabitants of the said city and liberties thereof for the time being, shall yearly without fraud or covin for ever pay their tithes to the parsons vicars and curates of the said city and their successors for the time being, after the rate hereafter following, that is to wit, Of every 10s rent by the year, of all houses shops warehouses cellars stables and every of them, within the said city and liberty thereof, 16d $\frac{1}{2}$. And of every 20s rent by the year 2s. 9d; and so above the rent of 20s by the year, ascending from 10s to 10s, according to the rate aforesaid.*

(2) Item,

(2) Item, that where any lease is or shall be made of any dwelling house or houses, shops, warehouses, cellars, or stables, or any of them, by fraud or covin, reserving less rent than hath been accustomed or is; or where any such lease shall be made without any rent reserved upon the same, by reason of any fine or income paid beforehand, or by any other fraud or covin; in every such case, the tenant or farmer shall pay for his tithes of the same, after the rate aforesaid, according to the quality of such rents as the same were last letten for without fraud or covin before the making of such lease.

(3) Item, that every owner or inheritor of any dwelling house or houses, shops, warehouses, cellars, or stables, inhabiting or occupying the same himself, shall pay after such rate, according to the quantity of such yearly rent as the same was last letten for, without fraud or covin.

(4) Item, if any person hath taken, or hereafter shall take any mease or mansion place by lease, and the taker thereof, his executors or assigns, doth or shall inhabit in any part thereof, and hath within eight years last past before this order, or hereafter shall let out the residue of the same; in such case, the principal farmer or farmers or first taker or takers thereof, their executors or assigns, shall pay their tithes after the rate abovesaid, according to the quantity of their rent by the year.

(5) And if any person shall take divers mansion houses, shops, warehouses, cellars, or stables, in one lease, and shall let out one or more of them, and shall keep one or more in his own hands, and inhabit in the same; the said taker, and his executors or assigns, shall pay their tithes after the rate abovesaid, according to the quantity of the yearly rent of such mansion house or houses retained in his own hands; and his assignees of the residue of the said mansion house or houses, shall pay their tithes after the rate abovesaid, according to the quantity of their yearly rents.

(6) Item, if such farmer or farmers, or his or their assigns, of any mansion house or houses, warehouses, shops, cellars, or stables, hath at any time within eight years last past, or shall hereafter let over all the said mansion house or houses contained in his or their lease, to one or more persons; the inhabitants, lessees, or occupiers thereof, shall pay their tithes after the rate of such rents as the inhabitants, lessees, or occupiers, and their assigns have been or shall be charged withal, without fraud or covin.

(7) Item, if any dwelling house within eight years last past was, or hereafter shall be converted into a warehouse, storehouse, or such like; or if a warehouse, storehouse, or such like, within the said eight years was, or hereafter shall be converted into a dwelling house; the occupiers thereof shall pay tithes for the same, after the rate above declared of mansion house rents.

(8) Item, that where any person shall demise any dyehouse or brewhouse, with implements convenient and necessary for dying or brewing, reserving a rent upon the same, as well in respect of such implements, as in respect of such dyehouse or brewhouse; the tenant shall pay his tithes after such rate as is abovesaid, the third penny abated: And every principal house or houses, with key or wharf, having any crane or gibet belonging to the same, shall pay after the like rate of their rents as is aforesaid, the third penny abated; and other wharfs belonging to houses having no crane or gibet, shall pay for tithes as shall be paid for mansion houses in form aforesaid.

(9) Item,

Tithes.

(9) Item, that where any mansion house with a shop, stable, warehouse, wharf with crane, timber yard, teinter yard, or garden belonging to the same, or as parcel of the same, is or shall be occupied together; if the same be hereafter severed or divided, or at any time within eight years last past were severed or divided, then the farmers or occupiers thereof shall pay such tithes as is abovesaid for such shops, stable, warehouses, wharf with crane, timber yard, teinter yard, or garden aforesaid, so severed or divided, after the rate of their several rents thereupon reserved.

(10) Item, that the said citizens and inhabitants shall pay their tithes quarterly, that is to say, at the feast of Easter, the nativity of St John Baptist, the feast of St Michael the archangel, and the nativity of our lord, by even portions.

(11) Item, that every householder paying 10 s rent or above, shall for him or her self be discharged of their four offering days; but his wife, children, servants, or others of their family, taking the rites of the church at Easter, shall pay 2 d for their four offering days yearly.

(12) Provided always, and it is decreed, that if any house which hath been or hereafter shall be letten for 10 s rent by the year, or more, be or hath been at any time within eight years last past, or hereafter shall be divided and leased, into small parcels or members, yielding less yearly rent than 10 s by the year; the owner, if he shall dwell in any part of such house, or else the principal lessee (if the owner do not dwell in some part of the same) shall pay for the tithes after such rate of rent, as the same house was accustomed to be letten for before such division or dividing into parts or members: And the under farmers and lessees to be discharged of all tithes for such small parcels parts or members, rented at less yearly rent than 10 sh by the year without fraud or covin, paying 2 d yearly for four offering days.

(13) Provided alway, and it is decreed, that for such gardens as appertain not to any mansion house, and which any person holdeth in his hands for pleasure, or to his own use; the person holding the same shall pay no tithes for the same. But if any person which shall hold any such garden, containing half an acre or more, shall make any yearly profit thereof by way of sale; he shall pay tithes for the same after such rate of his rent, as is herein first above specified.

(14) Provided also, that if any such gardens now being of the quantity of half an acre or more, be hereafter by fraud or covin divided into less quantities; then to pay according to the rate abovesaid.

(15) Provided alway, that this decree shall not extend to the houses of great men, or noblemen, or noblewomen, kept in their own hands, and not letten for any rent, which in times past have paid no tithes, so long as they shall so continue unletten: nor to any halls of crafts or companies, so long as they be kept unletten, so that the same halls in times past have not used to pay any tithes.

(16) Provided always, and it is decreed, that this present order and decree shall not in any wise extend to bind or charge any sheds, stables, cellars, timber yards, nor teinter yards, which were never parcel of any dwelling house, nor belonging to any dwelling house, nor have been accustomed to pay any tithes; but that the said citizens and inhabitants shall thereof be quit of payment of any tithes, as it hath been used and accustomed.

(17) Pro-

(17) *Provided also, and it is decreed, that where less sum than after 16 d^y in the 10 s rent, or less sum than 2 s 9 d in the 20 s rent, hath been accustomed to be paid for tithes; in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed.*

(18) *Item, it is also decreed, that if any variance controversy or strife shall arise in the said city for non payment of any tithes; or if any variance or doubt shall arise upon the true knowledge or division of any rent or tithes, within the liberties of the said city, or of any extent or assessment thereof; or if any doubt arise upon any other thing contained within this decree; then upon complaint made by the party grieved, to the mayor of the city of London for the time being, the said mayor by the advice of counsel shall call the parties before him, and make a final end in the same, with costs to be awarded by the discretion of the said mayor and his assistants, according to the intent and purport of this present decree.*

(19) *And if the mayor shall not make an end thereof within two months after complaint to him made, or if any of the said parties find themselves aggrieved; the lord chancellor of England for the time being, upon complaint to him made within three months then next following, shall make an end in the same, with such costs to be awarded as shall be thought convenient, according to the intent and purport of the said decree.*

(20) *Provided always, that if any person take any tenement for a less rent than it was accustomed to be letten for, by reason of great ruin or decay, burning, or such like occasions or misfortunes; such person, his executors or assigns, shall pay tithes only after the rate of the rent reserved in his lease, and none otherwise, as long as the same lease shall endure.*

(1) *Of every 10 s rent by the year]* It was resolved, in the case of Dr Meadhouse against Dr Taylor, that a rent for half a year, and afterwards for another half year, is a yearly rent, or a rent by the year, within the meaning of this decree. *Noy 130.*

Of all houses] In the case of *Green and Piper, E. 34 Eliz.* it was suggested, in order to hinder the granting of a consultation, that the house belonged to a priory which was discharged of tithes by bull. But the court replied, that by the common law houses paid no tithes; and the right in the present case subsisting immediately upon this statute, which lays them upon every house, no exemption shall be allowed, but to such houses as are specially exempted by the statute it self. *Cro. Eliz. 276.*

(2) *By reason of any fine or income paid beforehand, or by any other fraud or covin]* *M. 5 Jac.* Between *Skidmore* and *Bire* plaintiffs in a prohibition against *Bell* parson of St Michael Queen-hithe in London; the case was this: The said parson libelled before the chancellor of London for the tithes of an house called the boar's head in Breadstreet in the said parish, the ancient farm rent whereof was 5 l at the time of the said decree and after; and that of late a new lease was made of the said house, rendering the rent of 5 l a year, and over that a great income or fine which was covenanted and agreed to be paid yearly at the same day; that the rent was paid as a sum in gross, and that so much rent might have been reserved for the said house, as the rent reserved and the sum in gross amounted

amounted unto; which reservation and covenant were made to defraud the said parson of the tithes of the true rent of the said house, which to him did appertain by the purport and true intention of the said decree. And in this case four points were resolved by the court: 1. If so much rent be reserved, as was accustomed to be paid at the making of the said decree (whatsoever fine or income be paid), that the parson can aver no covin; for the words of the decree be, "Where any lease is or shall be made of any dwelling house by fraud or covin, in reserving less rent than hath been accustomed": so as if the accustomed rent be reserved, no fraud can be alledged; for the fraud by the decree is, when lesser rent than was then accustomed to be paid is reserved, or if no rent at all be reserved, for then tithe shall be paid according to the rent that then was last before reserved to be paid. So as the decree consisteth upon four points; first, where the accustomed rent was reserved; secondly, where the rent was increased, there the tithes should be paid according to the whole rent; thirdly, where lesser rent was reserved; and fourthly, where no rent was reserved, but had been formerly reserved. And this act and decree were very beneficial for the clergy of London, in respect of that which they had before. And the defendant in his libel confesseth, that the accustomed rent was reserved; and therefore no cause of suit. 2. It was resolved, that as to such houses as were never letten to farm, but inhabited by the owner, this is casus omiffus, and shall pay no tithes by force of the decree. 3. It was resolved, that where the decree saith, "Where no rent is reserved by reason of any fine or income paid beforehand"; albeit no fine or income be paid in that case, yet if no rent be reserved, the parson shall have his tithes according to the decree; for that is put but for an example or cause, why no rent is reserved; and whether any fine or income were paid or no, is not material as to the parson. 4. It was resolved, that the parson could not sue for the said tithes in the ecclesiastical court; for that the act and decree that raised and gave these kind of tithes, did limit and appoint how and before whom the same should be sued for, and did appoint new and special judges to hear and determine the same. And in the end it was awarded, that the prohibition should stand. 2 *Inst.* 660.

(18) *Upon complaint made*] In the aforesaid case of *Dr Meadhouse* and *Dr Taylor*, it was held by the court, that the complaint ought to be in writing (and not by word of mouth only), in nature of a *monstrans de droit*, declaring all the title. *Noy* 130.

To the mayor] Pursuant to the aforesaid case of *Skidmore* and *Eire*, divers prohibitions have been granted (when tithes were sued for upon this statute) to the ecclesiastical court. But when it was pleaded in the year 1658, that the right of tithes, upon the foundation of this act, could not be cognizable in the exchequer, by reason of the provision therein made for determining of all controversies before the lord mayor or lord chancellor; it was held clearly by the barons, that the court of exchequer had jurisdiction in the cause, because the act had no negative words in it. — Upon which *Dr Gibson* shrewdly observes, that if affirmative words

words will not exclude the temporal court, it may be hard to find a good reason, (why according to the foregoing judgments) they should exclude the spiritual court. *Gibf.* 1223.

After all, notwithstanding this settlement by the aforefaid decree, divers prescriptions for the payment of lesser rates than the parsons might require by the said settlement (as to pay 10s. for the tithe of an house, altho' the rent thereof was 40l a year or more) have been gained and allowed. But upon the occasion of the fire of London in the year 1666, as to the churches and houses thereby consumed, another statute was made, namely, the 22 & 23 C. 2. c. 15. which is as followeth: *Whereas the tithes in the city of London were levied and paid with great inequality, and are since the late dreadful fire there, in the rebuilding of the same, by taking away of some houses, altering the foundations of many, and the new erecting of others, so disordered, that in case they should not for the time to come be reduced to a certainty, many controversies and suits of law might thence arise; it is therefore enacted, that the annual certain tithes of the parishes within the said city and liberties thereof, whose churches have been demolished, or in part consumed by the late fire, and which said parishes by virtue of an act of this present parliament remain and continue single as heretofore they were, or are by the said act annexed or united into one parish respectively, shall be as followeth; that is to say, the annual certain tithes, or sum of money in lieu of tithes,*

(1) Of the parish of Alhallows Lombard street	_____	_____	110l.
(2) Of St Bartholomew Exchange	_____	_____	100l.
(3) Of St Bridget, alias Brides	_____	_____	120l.
(4) Of St Bennet Finck	_____	_____	100l.
(5) Of St Michael Crooked-lane	_____	_____	100l.
(6) Of St Christopher	_____	_____	120l.
(7) Of St Dionis Back-church	_____	_____	120l.
(8) Of St Dunstan in the east	_____	_____	200l.
(9) Of St James Garlick-hythe	_____	_____	100l.
(10) Of St Michael Cornhill	_____	_____	140l.
(11) Of St Michael Bassishaw	_____	_____	132l. 11s.
(12) Of St Margaret Lothbury	_____	_____	100l.
(13) Of St Mary Aldermanbury	_____	_____	150l.
(14) Of St Martin Ludgate	_____	_____	160l.
(15) Of St Peter Cornhill	_____	_____	110l.
(16) Of St Stephen Coleman-street	_____	_____	110l.
(17) Of St Sepulchre	_____	_____	200l.
(18) Of Alhallows Bread-street, and St John Evangelist	_____	_____	140l.
(19) Of Alhallows the great, and Alhallows the leis	_____	_____	200l.
(20) Of St Alban Wood-street, and St Olaves Silver-street	_____	_____	170l.
(21) Of St Anne and Agnes, and St John Zachary	_____	_____	140l.
(22) Of St Augustine, and St Faith	_____	_____	172l.
(23) Of St Andrew Wardrobe, and St Anne Black-friars	_____	_____	140l.
(24) Of St Antholin, and St John Baptist	_____	_____	120l.
(25) Of St Bennet Grace-church, and St Leonard Eastcheap	_____	_____	140l.
(26) Of St Bennet Pauls-wharf, and St Peter Pauls wharf	_____	_____	100l.

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(27) Of

Tithes.

(27) Of Christ church, and St Leonard Foster-lane	200l.
(28) Of St Edmond the king, and St Nicholas Acons	180l.
(29) Of St George Botolph-lane, and St Botolph Billingsgate	180l.
(30) Of Laurence Jury, and St Magdalen Milk-street	120l.
(31) Of St Magnus, and St Margaret New Fish-street	170l.
(32) Of St Michael Royal, and St Martin Vintry	140l.
(33) Of St Matthew Friday-street, and St Peter Cheap	150l.
(34) Of St Margaret Pattons, and St Gabriel Fen-church	120l.
(35) Of St Mary at Hill, and St Andrew Hubbard	200l.
(36) Of St Mary Woolnoth, and St Mary Woolchurch	160l.
(37) Of St Clement Eastcheap, and St Martin Orgars	140l.
(38) Of St Mary Ab-church, and St Lawrence Pountney	120l.
(39) Of St Mary Aldermary, and St Thomas apostle	150l.
(40) Of St Mary le Bow, St Pancras Super-lane, and Alhallow's Honey-lane	200l.
(41) Of St Mildred Poultry, and St Mary Cole-church	170l.
(42) Of St Michael Wood-street, and St Mary Staining	100l.
(43) Of St Mildred Bread-street, and St Margaret Moles	130l.
(44) Of St Michael Queenhyth, and Trinity	160l.
(45) Of St Magdalen Old Fish-street, and St Gregory	120l.
(46) Of St Mary Somerset, and St Mary Mounthaw	110l.
(47) Of St Nicholas Coleabby, and St Nicholas Olaves	130l.
(48) Of St Olave Jewry, and St Martin Ironmonger-lane	120l.
(49) Of St Stephen Walbrook, and St Bennet Sheerhogg	100l.
(50) Of St Swythin, and St Mary Bothaw	140l.
(51) Of St Vedast, alias Foster's, and St Michael Quern	160l.

f. 2.

Which respective sums of money to be paid in lieu of tithes within the said respective parishes, and assessed as herein after is directed, shall be the respective certain annual maintenance (over and above glebes and perquisites, gifts and bequests to the respective parson vicar and curate of any parish for the time being, or to their successors respectively, or to others for their use) of the said respective parsons vicars and curates, who shall be legally instituted inducted and admitted into the respective parishes aforesaid. f. 3.

And for the more equal levying of the same upon the several houses buildings and other hereditaments within the respective parishes, assessments were ordered to be made before July 24, 1671, upon all houses, shops, warehouses, and cellars, wharfs, keys, cranes, waterhouses, tofts of ground (remaining unbuilt), and all other hereditaments whatsoever (except parsonage and vicarage houses), the whole respective sum by this act appointed, or so much of it as is more than what each impropiator is by this act enjoined to allow. f. 4, 5, 6, 7.

And three transcripts of the assessments were to be made; one to be deposited amongst the records of the city, another in the registry of the bishop of London, and another in the parish vestry respectively, for a perpetual memorial thereof. f. 8.

The sums assessed to be paid to the respective parsons vicars and curates, at the four most usual feasts, to wit, at the annunciation of the blessed virgin,
the

the nativity of St John Baptist, the feast of St Michael the archangel, and the nativity of our blessed saviour, or within fourteen days after each of the feasts aforesaid, by equal payments; the respective payments thereof to begin and commence only from such time as the incumbent shall begin to officiate or preach as incumbent. s. 9.

Impropiators shall pay what bona fide they have used and ought to pay to the respective incumbents at any time before the said late fire; the same to be computed as part of the maintenance of such incumbent. s. 10.

And if any inhabitant shall refuse or neglect to pay to the incumbent the sum appointed by him to be paid (the same being lawfully demanded upon the premises); it shall be lawful for the lord mayor, upon oath to be made before him of such refusal or neglect, to grant out warrants for the officer or person appointed to collect the same, with the assistance of a constable in the day time, to levy the same by distress and sale of the goods of the party so refusing or neglecting; restoring to the owner the overplus over and above the said arrears and the reasonable charges of making such distress. s. 11.

And if the lord mayor shall refuse or neglect to execute any of the powers to him given by this act; it shall be lawful for the lord chancellor or lord keeper, or two or more of the barons of the exchequer, by warrant under their hands and seals respectively, to do and perform what the said lord mayor might or ought to have done in the premises. s. 12.

Provided, that no court or judge, ecclesiastical or temporal, shall hold plea of or for any the sum or sums of money due and owing or to be paid by virtue of this act; other than the persons hereby authorized to have cognizance thereof: nor shall it be lawful to or for any parson vicar curate or incumbent, to convene or sue any person assessed as aforesaid and refusing or neglecting to pay the same in any court or courts, or before any judge or judges, other than what are authorized and appointed by this act, for the hearing and determining of the same, in manner aforesaid. s. 14.

Provided also, that it shall be lawful for the warden and minor canons of St Paul's, parson and proprietors of the rectory of the parish of St Gregory aforesaid, to receive and enjoy all tithes oblations and duties arising or growing due within the said parish, in as large and beneficial manner, as formerly they have or lawfully might have done. s. 15.

*And for the better recovering the sums of money which shall be due according to the directions of this act, and for the levying of arrears where the occupier removes from the premises, or the houses have stood empty; a decree was made in the year 1713, by Harcourt lord chancellor, assisted by the barons Bury and Price, in the case of *Savage and Wood*, clerks, against *Harding* and others. *Shaw's Par. L.* 45.*

For the stipends of the ministers of the fifty new churches, provision is made by the several acts of parliament relating thereunto, to be raised from the duties on coals.

There are moreover several particular statutes for particular churches, in London and elsewhere.

Tithes.

After all, these pecuniary compensations, however reasonable at first, must in process of time become insufficient, as the value of money decreaseth. And this hath been the case of all modus's; which, at the time of their commencement, were the real value of the tithes. On the other hand, it must be acknowledged, that the payment of tithes in kind is in many respects troublesome and inconvenient. If a method could be established, that the minister should receive an equivalent, durable, and not liable to diminution by the fluctuation of money, the people generally would be desirous to purchase their tithes at the highest supposable estimation; which if employed in a purchase of land, the value thereof would continue in proportion as the tithes would have done, forasmuch as the annual rent of the land will always be according to its produce.

Form of a lease of tithes.

THIS indenture made the ——— day of ——— in the year ——— between A. B. rector of the parish of ——— in the county of ——— of the one part, and C. D. of ——— in the parish of ——— and county of ——— yeoman, of the other part, Witneseth, that the said A. B. for and in consideration of the rent herein after reserved and contained, Hath demised, granted, and to farm let, and by these presents doth demise, grant, and to farm let, unto the said C. D. his executors, administrators, and assigns, All and all manner of tithes of corn, grain, hay, and herbage, yearly growing increasing or happening within the said parish of ——— and all profits of what kind soever belonging to the parsonage or rectory there: To have, hold, receive, and take all and every the said tithes and profits unto the said C. D. his executors administrators and assigns, from the day of the date of these presents, for and during and unto the full end and term of twenty one years from thence next ensuing, and fully to be compleated; if he the said A. B. shall so long continue rector of the said parish of ——— Yielding and paying therefore yearly and every year during the said term, unto the said A. B. and his assigns, the rent or sum of ——— at and upon the days ——— by even and equal portions. Provided always, that if the said rent or any part thereof shall be behind and unpaid by the space of ——— days after the days and times appointed and limited for the payment thereof, then this present demise and every thing herein contained shall cease, determine, and be void. And the said C. D. doth for himself, his executors administrators and assigns, and for every of them, covenant promise and grant to and with the said A. B. his executors and administrators, and to and with every of them by these presents, that he the said C. D. his executors administrators or assigns, shall and will from time to time, and at all times during the continuance of this demise, well and truly pay and satisfy the rent aforesaid, at the days and times aforesaid appointed for the payment thereof; and also shall and will pay and discharge all taxes which shall be imposed upon the said demised premises, or in respect thereof, by act of parliament or otherwise. And the said A. B. for himself, his executors and administrators, and every of them, doth covenant promise and grant to and with the said

C. D.

Tithes.

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C. D. his executors, administrators, and assigns, and to and with every of them by these presents, that for and under the rents and covenants herein before reserved and contained on the part of the said C. D. his executors administrators or assigns to be paid and performed, he the said C. D. his executors administrators and assigns shall and may have, hold, and enjoy the tithes and premises aforesaid, and every part and parcel thereof during the said term hereby granted, without any let, trouble, molestation, interruption, or denial of him the said A. B. or his assigns, or any other person or persons claiming or to claim by, from, or under him. In witness whereof the parties to these presents have interchangeably set their hands and seals the day and year first abovewritten.

Signed, sealed, and delivered (having been first duly stamped) in the presence of

A. B.
C. D.

E. F.
G. H.

Note, it is said generally in some books, that a verbal lease of tithes is not good. Others say, that tithes may be granted for one year without deed, but no longer. Others distinguish, and say, that a grant of tithes even for one year is not good by way of lease, but may be good by way of sale. Others, to the like purpose, affirm, that if the parson agrees with a parishioner, that such parishioner shall keep back his own tithes for a year, this is a good bargain by way of retainer; but if he grants to him the tithes of another, tho' it be but for a year, it is not good unless it be by deed. *Cro. Ja. 613. 1 Roll's Rep. 174. God. 354. Freem. Rep. 234. 2 Brownl. 17.*

And by the several stamp acts, such lease (for whatever term it is made) must be on a 2s. 6d. stamp.

Title for orders. See Ordination.

Toleration. See Dissenters.

Tomb stones. See Burial.

Translation. See Bishops.

Transubstantiation. See Lord's Supper.

Trees in the church yard. See Church.

Trentals.

Trentals.

TRENTALS, *trigintalia*, were masses for souls departed, to be said thirty times in such order as should be appointed; or for thirty days together; or otherwise every thirtieth day: according to the direction of the donor or founder, who instituted a stipend for that purpose.

Troper.

TROPER, *troperium*, is the book which containeth the sequences; which were devotions used in the church, after reading of the epistle. *Lindw.* 251.

Tunic.

TUNIC, *tunica*, was the subdeacons garment, which he wore in serving the priest at the celebration of the mass. *Lind.* 252.

Vacation.

Who shall have the profits during the vacancy of a benefice.

1. **B**Y the common law of the church, the profits of the vacation were to be laid out for the benefit of the church, or reserved for the successor; but by special privilege or custom, the bishop or archdeacon might have the same, or some part thereof: so also, it is said, the king might take the profits of a free chapel, and the patron of a donative the profits of such donative, during the time of vacation. *Lind.* 137. *Gibf.* 749.

But by the statute, of the 28 H. 8. c. 11. it is enacted as followeth: viz. *Forasmuch as in the statute for the payment of first fruits, it is not declared who shall have the fruits tithes and other profits of spiritual promotions offices benefices and dignities, during the time of vacation thereof; divers of the archbishops and bishops of this realm have not only when the time of the taking of tithes hath approached deferred the collation of such benefices as have been of their own patronage, but also have upon presentations of clerks made*
unto

unto them by the just patrons deferred to institute induct and admit the same clerks, to the intent that they might receive to their own use the same tithes growing and arising during the vacation; so that thro' such delays (over and above the first fruits) they have been constrained to lose all or the most part of one year's profits, to their great loss and hindrance: it is therefore enacted, that the tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues casualties and profits, certain and uncertain, belonging to any archdeaconry, deanry, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion benefice dignity or office, growing or coming during the time of vacation, shall belong to such person as shall be thereunto next presented, promoted, instituted, inducted, or admitted, towards the payment of his first fruits.

And if any archbishop, bishop, archdeacon, ordinary, or any other person or persons to their uses and behoof, shall receive or take the same, and shall not upon reasonable request render the same to the next incumbent lawfully instituted inducted or admitted, or shall let or interrupt the said incumbent to have the same; he shall forfeit treble value, half to the king, and half to the incumbent, to be recovered in any of the king's courts.

To such person as shall be thereunto next presented, promoted, instituted, inducted, or admitted] In order to receive the benefit of this clause, it is not absolutely necessary, that the clerk be presented by the lawful patron; but if he get institution and induction, tho' he is afterwards removed by *quare impedit*, he, and not the clerk who comes in upon such removal, shall have the profits of the vacation. And the reason is, because till he is removed, he is incumbent *de facto*, and as such is liable to all burdens and duties, and is therefore in reason and equity intitled to all the profits. 1 Roll's Rep. 62. Gibf. 749.

But in cases where the institution and induction are declared by law to be ipso facto void (as in case of simony, or the like), there the church having been really never full since the death of the foregoing incumbent, and by consequence the vacancy still continuing, there the profits of course shall pass to him who shall be next presented, instituted, and inducted. Gibf. 749.

But tho' the church doth become void by the omission of some subsequent duty to be performed, yet having been full by institution and induction, and the person thereby liable to the payment of first fruits, he shall not lose the profits of the vacation; only the profits from the time of such avoidance ipso facto will go to the next incumbent, as profits of the vacation, which commenceth from thence. Gibf. 749.

Inducted or admitted] This cannot be understood disjunctively, as if presentation or admission (without institution and induction) intitled the successor to the profits of the vacation; but admission here (coming after induction) was plainly added, to include those preferments which are not taken by institution and induction. And altho' in preferments which are so taken, institution gives a right to enter upon and take the profits as well of the vacation, as others; yet that which alone can give a right to sue for them, is induction. Gibf. 749.

Sequestration
issued, on a
benefice be-
coming void.

2. Anciently, upon the death of an incumbent, without any formal sequestration, the rural dean was to take the vacant benefice into his safe custody, and to provide for the necessary cure of souls; and to take care that the glebe land was seasonably tilled and sowed, to the best advantage of the successor, to whom they were to give up the intermediate profits, and be allowed their necessary charges, which upon dispute were to be moderated by the bishop or his official. But the canon lawyers in process of time deprived the country deans of this, as well as of all other parts of jurisdiction; and the chancellors of bishops, or their archdeacons, laid claim to the custody of vacant churches, and by forms of sequestration assigned them over to the oeconomi or lay guardians of the church. *Ken. Par. Ant.* 647.

For now, the ordinary way of managing the profits of vacation is by sequestration granted to the churchwardens. Upon consideration of which, Dr Watson and Dr Gibson take occasion to wish, that some of the neighbouring clergymen might be appointed, and would take upon them the trouble of that office, in inspecting and managing the profits, and of supplying or providing for the cure; and that the ordinary, in granting patents, would not convey to chancellors, commissaries, or officials, the right of granting these sequestrations in times of vacation, but would reserve it to their own immediate cognisance; since it is a point, in which the interest of the church and clergy, and also the immediate care of souls for the time, are so nearly concerned. *Gibbs.* 749.

Management
of the profits.

3. The churchwardens, having taken out a sequestration under the seal of the office, are to manage all the profits and expences of the benefice for the successor; to plough and sow the glebe, gather in tithes, thresh out and sell corn, repair houses, make up his fences, pay his tenths, synodals, and procurations; and what other things are necessary during the vacation.

But the sequestrators cannot maintain an action for tithes in their own name, at common law, nor in any of the king's temporal courts; but only in the spiritual court, or before the justices of the peace in such cases as the law impowers them to hear and determine. *Johns.* 122.

Thus in the case of *Berwick and Swanton*, T. 1692; it was resolved, that a sequestrator cannot bring a bill alone for tithes; because he is but as a bailiff, and accountable to the bishop, and has no interest. *Bunb.* 192.

Supply of the
cure.

4. By the statute of 28 H. 8. c. 11. *It shall be lawful to every archbishop, bishop, archdeacon, and ordinary, their officers and ministers, to retain in their custody so much of the profits of the vacation, as shall be sufficient to pay unto such person as shall serve the cure his reasonable stipend or salary.* s. 5.

And if the fruits of the vacation be not sufficient to pay the curates stipend and wages for serving the cure the vacation time; the same shall be born and paid by the next incumbent, within fourteen days next after he hath the possession of his living. s. 10.

And it may be safest for the churchwardens, to get it stated by the ordinary, when they take out the sequestration, what they are to pay to the

the curate weekly for the serving of the cure; and then there can be no contention about it when they make up their accounts. *Par. L. c. 29.*

And Dr Gibson says, such curate ought to be duly licensed by the ordinary, for serving of the cure; otherwise if he proceeds without such licence, he can have no title to any stipend or salary; nor can any be legally reserved and deducted for him. *Gibf. 750.*

5. By the 28 H. 8. c. 11. *The successor, after the death of his predecessor, shall have upon one month's warning after the time of his induction, the mansion* ^{Successor when to enter.} *house of the parsonage, vicarage, or other spiritual promotion, with the glebe belonging to the same not being sown at the time of his predecessor's death, for maintenance of his household; deducting therefore in his rent, as heretofore hath been born for the same, or as it is reasonably worth. f. 9.*

6. As soon as a new incumbent is instituted and inducted, the sequestrators are to account to him for all the profits of the benefice, which ^{Sequestrators} they have received during the vacancy. *Watf. c. 30.*

In which account they may deduct their reasonable expences, for the collecting and levying the tithes, fruits, emoluments, rents, and other profits rising and growing during the vacation. 28 H. 8. c. 11. f. 5.

If he be dissatisfied with the account, he may bring them to account before the ordinary, by whom all things relating hereunto are properly examinable and to be determined. *Watf. c. 30.*

In the case of *Jones and Barret, H. 1724*; on a bill by the vicar of West Dean in the county of Suffex against the defendant, who was sequestrator, for an account of the profits received during the vacation, it was objected for the defendant, that the bishop ought to have been made a party, since the sequestrator is accountable to him for what he receives, by the statute of 28 H. 8. And the court seemed to think the bishop should have been a party; but by consent the cause was referred to the bishop of the diocese. *Bunb. 192.*

7. By the 28 H. 8. c. 11. *If an incumbent before his death hath caused* ^{Proportioning} *any of his glebe lands to be manured and sown at his proper costs and charges* ^{the profits with} *with any corn or grain; he may make his testament of all the profits of the* ^{the predecessor's} *corn growing upon the said glebe lands so manured and sown. f. 6.*

But if his successor is inducted before the severance thereof from the ground, the successor shall have the tithe thereof; for altho' the executor represent the person of the testator, yet he cannot represent him as parson, inasmuch as another is inducted. 1 *Roll's Abr. 655.*

Otherwise, if the parson dieth after severance from the ground, and before the corn is carried off; in this case, the successor shall have no tithe; because, tho' it was not set out, yet a right to it was vested in the deceased parson by the severance from the ground. The same is true in case of deprivation, or resignation, after glebe sown: the successor shall have the tithe, if the corn was not severed at the time of his coming in; otherwise if severed. *Gibf. 662.*

By the statute of the 11 G. 2. c. 19. *Where any tenant for life shall die before or on the day on which any rent was reserved or made payable, upon any demise or lease of any lands tenements or hereditaments, which determined on the death of such tenant for life; the executors or administrators of such*

tenant for life may in an action upon the case recover of the under tenant, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due; making all just allowances, or a proportionable part thereof. §. 15.

Under which words, *lands, tenements, or hereditaments*, are included not only *glebe lands*, but also *tithes* demised or leased, which are *hereditaments*: But if the tithes are not leased, or (which amounts to the same thing) if it is only a verbal lease, the law seemeth to stand as it was before; and consequently in such case, where there is no proper lease, the person who receives the tithes shall be accountable to the executor for the tithes received by him and which became due before the incumbent's death, and to the successor for the tithes (if any) which he received and which became due after the incumbent's death.

And here a case frequently happeneth, with respect to *modus's* in lieu of tithes; which tithes, if taken in kind, would have been due before the death of the incumbent, and the *modus* for the same is not due till after the death of the incumbent. Which case being not within the purview of this statute, it seemeth that the executors are not intitled to the said *modus* or to any part thereof; but that the whole shall go to the successor.

There is another case, wherein it may be disputed, at what time the *modus* it self shall be said to be due. As for instance, it is usual in many places to ascertain the *modus* at *martinmas*, by then taking an account of the stock for the year preceding; and not to receive the *modus* till easter following. In which case, if it shall appear from the evidence, as from payments thereof sometimes made at the time when ascertained, or in the intermediate space betwixt that time and the more usual and ordinary days of payment, or from receipts given and accepted for the same as due at the time when ascertained, or the like, and that the payment thereof was only deferred for convenience, when the incumbent should receive his other dues, or for other like cause; in such case it will be due to the executor: But if it shall appear, that the same hath been understood as not due until such future day, and only advanced sometimes before such day to answer the incumbent's necessities or other convenience, then it seemeth that it will go to the successor. So that this is a matter not of law, but of fact; and depends upon the evidence.

As to disputes concerning things fixed to the freehold, as hangings, tapestry, grates, glasses, furnaces, and such like; these, falling in with the general doctrine about what shall belong to heirs or successors on the one hand, and executors or administrators on the other, are treated of under the title *Wills*.

Vacation of bishopricks. See *Bishops*.

Wesley.

Vestry.

1. **A** Vestry, properly speaking, is the assembly of the whole parish Vestry, what met together in some convenient place, for the dispatch of the affairs and business of the parish; and this meeting being commonly held in the vestry adjoining to, or belonging to the church, it thence takes the name of vestry, as the place it self doth, from the priest's vestments, which are usually deposited and kept there. *Par. L. c. 17.*
2. On the Sunday before a vestry is to meet, publick notice ought to be given, either in the church after divine service is ended, or else at the church door as the parishioners come out; both of the calling of the said meeting, and also of the time and place of the assembling of it; and it will be fairest then also to declare for what business the said meeting is to be held, that none may be surpris'd, but that all may have full time before, to consider of what is to be propos'd at the said meeting. *Watf. c. 39. Par. L. c. 17.* Notice of the meeting.
3. Anciently, at the common law, every parishioner who paid to the church rates, or scot and lot, and no other person, had a right to come to these meetings: But this must not be understood of the minister; who hath a special duty incumbent on him in this matter, and must be responsible to the bishop for his care herein; and therefore in every parish meeting, he presides for the regulating and directing this affair; and this equally holds, whether he be rector or vicar. *Par. L. c. 17.* Who may vote.
- Also out-dwellers, occupying land in the parish, have a vote in the vestry, as well as the inhabitants. *Johns. 19.*
4. *E. 11 G. Phillybrown and Ryland.* The plaintiff brought a special action upon the case, for excluding him from the vestry room; and upon demurrer, the court made no difficulty, but that such an action was maintainable: however, in this case, they gave judgment for the defendant, it not being averred that the parish had any property in this room, or right to meet there; so that, for ought appears it might be the defendant's own house, and then he might let in whom he pleased, and refuse the rest. *Str. 624.* Hindring persons from the meeting.
5. And when they are met, the major part present will bind the whole parish. *Watf. c. 39.* Majority conclusive.
6. *T. 9 G. 2. Stoughton and Reynolds.* Adjudged, that the right of adjourning the vestry, is not in the minister or any other person as chairman, nor in the churchwardens, but in the whole assembly, where all are upon an equal footing; and the same must be decided (as other matters there) by a majority of votes. *Str. 1045.* Power of adjourning.
7. And to prevent disputes, it may be convenient, that every vestry act be entred in the parish book of accounts; and that every man's hand consenting to it, be set thereto. *Par. L. 54.* Entry of acts made.

8. The

Clerk.

8. The vestry clerk is chosen by the vestry; and he acts as register or secretary thereto, but hath no vote: and his business is, to attend at all parish meetings, and to draw up and copy all orders and other acts of the vestry, and to give out copies thereof when necessary: and therefore he hath the custody of all books and papers relating thereto. *Par. L. c. 18.*

Beadle.

9. The beadle (in the saxon *bydel*, from *beodan*, to bid) is chosen also by the vestry; and his business is to attend the vestry, to give notice to the parishioners when and where it is to meet, and to execute its orders as their messenger or servant. *Par. L. c. 17.*

Select vestry.

10. Select vestries seem to have grown from the practice of choosing a certain number of persons yearly, to manage the concerns of the parish for that year; which by degrees came to be a fixed method, and the parishioners lost not only their right to concur in the publick management as oft as they would attend, but also (in most places, if not in all) the right of electing the managers. And such a custom, of the government of parishes by a select number, hath been adjudged a good custom; in that the churchwardens accounting to them was adjudged a good account. *Gibbs. 219.*

In some parishes, these select vestries having been thought oppressive and injurious; great struggles have been made, to set aside and demolish them. *Par. L. c. 17.*

And no wonder that it hath been so, in such parishes where by custom they have obtained the power to chuse one another; for it is not to be supposed, but that if they are guilty of evil practices, they will chuse such persons as they think will connive at or concur with them therein.

M. 2 W. Batt and others against *Watkinson*. In a prohibition prayed to the spiritual court at York, the suggestion set forth, that the parish of *Masbam* in *Yorkshire* was an ancient parish, and that time out of mind there were twenty four of the chief parishioners, who all along had been called the four and twenty; and that during time immemorial, as often as any one of the said four and twenty parishioners happened to die, the rest surviving of the four and twenty did chuse, and during all the said time used to chuse, one other fit and able parishioner of the same parish, to be one of the four and twenty, in the room of him so deceased; and that within the said parish there is, and during time immemorial there always hath been a custom, that the said four and twenty for the time being have been used and accustomed, as often as there was occasion, to make rates, and to assess reasonable sums of money, upon the parishioners and inhabitants in the said parish for the time being for the repairs of the church; and that the churchwardens of the said parish, during all the time aforesaid, have used to receive all duties and dues for burials in the body or iles of the said church; and if any of the inhabitants refused to pay the said rates or dues for burials as aforesaid, then the churchwardens by warrant from the twenty four for the time being, were used to distrain the goods and chattels of the said parishioners in the said parish; and that the said twenty four, with the consent of the vicar or curate, have used to repair the body and iles of the said church; and that the churchwardens for the time being, during all the time aforesaid, have always used

used to give up their accounts to the said four and twenty, who allowed or disallowed the said accounts as they saw expedient; and that on the allowance of such account, the churchwardens have always been discharged from giving any other account in any other place; that the plaintiffs were churchwardens for the year 1680; and after their year was ended, they gave in their accounts to the four and twenty; and that tho' all pleas concerning prescriptions and customs ought to be determined by the common law, yet the defendant hath drawn and cited them into the spiritual court, to give in and pass their said accounts there; and altho' the said plaintiffs have pleaded all the matters aforesaid in the said spiritual court, yet the said defendant hath refused to admit or to receive the said plea. Upon great debate of this case at several times, the court was of opinion, that the custom was good and reasonable, and a prohibition was granted. *Lutw.* 1027.

So that prescription and constant immemorial usage, seems to be the basis and only support of this select vestry. And pursuant hereunto, upon the same foundation, and for the same reasons, was the select vestry of the parish of St Mary At-Hill in London confirmed and established in the king's bench, not many years ago. And since that time, the select vestries of St Saviour's and St Olave's in Southwark, for want of proof of such prescription and immemorial usage, have been set aside and demolished. *Par. L. c.* 17.

In the act of the 10 *An. c.* 11. for building fifty new churches; the commissioners shall appoint a convenient number of sufficient inhabitants to be vestrymen; and from time to time, upon the death removal or other voidance of any such vestryman, the rest or majority of them may chuse another. *f.* 20.

In the several private acts for building particular churches; sometimes the minister, churchwardens, overseers of the poor, and others who have served, or paid fines for being excused from serving those offices; sometimes, the minister, churchwardens, overseers of the poor, and all who pay to the poor rate; sometimes, only all who pay such a sum to the poor rate; sometimes, all who rent houses of so much a year; — are appointed to be vestrymen within such parishes, and no other persons.

Vicar.

A Vicar, *vicarius*, is one that hath a spiritual promotion or living under the parson; and is so denominated, as officiating *vice ejus*, in his place or stead. And such a promotion or living is called a *vicarage*; which is a part or portion of the parsonage, allotted to the vicar for his maintenance and support.

This part or portion is in some places an annual sum of money certain; but in most places it is a part of the tithes in kind, which most commonly

monly is the small tithes; and in some places he hath a part of the great tithes, and also of the glebe: and such a one is called a vicar endowed.

Thus he that hath the right to the possession of the lesser part, is called the vicar; and he that hath the other and greater part of tithes, is called the parson, who in some parishes is a clergyman, and sometimes the minister or incumbent of the same church; but in other places he is a mere layman, and cannot supply the church but by a spiritual vicar: and this so possessed by a layman, is called an *impropriation*, and himself the *impropriator*.

An *appropriation* is properly, when such a parsonage (or vicarage, or other church preferment) is in the hands or possession of some ecclesiastical person and his successors, and can be made only to a body politick or corporation spiritual, that hath succession, whereby such body becomes perpetual incumbent of the benefice appropriated, and shall for ever enjoy the tithes and other profits, and the cure of souls belonging thereto.

But the words *impropriation* and *appropriation* are generally confounded in the books: and the law concerning the whole is treated of under the title *Appropriation*.

Vicar general.

Vicar general is an officer, whose office is usually annexed to that of *Chancellor*; and is therefore treated of under that title.

Vigil. See *Holidays*.

Vi laica removenda.

Vi laica removenda is a writ which (upon the bishop's certificate into chancery of a force and resistance touching a church) lieth where a debate or controversy is between two parsons for a church, the one whereof doth enter into the church with strong hand and great power of the laity, holding the other out, and keeping possession thereof with force and arms. Whereupon he that is so held out of possession may have the said writ directed to the sheriff of the county, to remove the force within that church, and (if need be) to raise the power of the county to his assistance, and to arrest and imprison the persons that make resistance, so as to have their bodies before the king at a certain day to answer the contempt. Which writ is sometimes grantable without the bishop's certificate as aforesaid: for it may, as it seemeth, be had upon a surmise made thereof by

by the incumbent himself without such certificate; there being a distinct and several form thereof in each of the said cases. So that this writ properly lieth for the removal of any forcible possession of a church kept by laymen. *God. 645. F. N. B. 124.*

By this writ the sheriff ought not to remove the incumbent who is in possession of the church, whether the possession be of right or wrong; but only to remove the force. *F. N. B. 125.*

The writ is made returnable into the king's bench, in which court the offenders shall be fined and punished for the force: and restitution also shall be awarded out of the same court (as it seemeth). *Watf. c. 30.*

Uⁱsitation.

NOTE, free chapels and donatives (unless such donative hath received the augmentation of queen Anne's bounty) are exempt from the visitation of the ordinary; the first being visitable only by commission from the king, and the second by commission from the donor; And there are also other churches and chapels exempted, which did belong to the monasteries; having heretofore obtained exemptions from ordinary visitation, and being visitable only by the pope; which by the statute of the 25 *H. 8. c. 21.* were made visitable by the king, or by commission under the great seal. These, and other exempted churches or chapels, so far forth as they are exempted, are not treated of under this title; the purport whereof extendeth only to places visitable by the bishop or his subordinate officers.

1. For the government of the church, and the correction of offences, Origin, visitations of parishes and dioceses were instituted in the ancient church; that so all possible care might be taken to have good order kept in all places. *God. Append. 7.*

2. For the first six hundred years after Christ, the bishops in their own persons visited all the parishes within their respective dioceses every year; and they had several deacons in every diocese to assist them. After that, they had authority in case of sickness, or other publick concerns, to delegate priests or deacons to assist them; and hereupon, as should seem, they cantoned their great dioceses into archdeaconries, and gave the archdeacons commissions to visit and inquire, and to give them an account of all at the end of their visitations; and the bishops reserved the third year to themselves, to inform themselves (amongst other things) how the archdeacons their substitutes performed their duties. *Deg. p. 2. c. 15. Johnf. 151.*

3. By a constitution of *Otho*: Archbishops and bishops shall go about their dioceses at fit seasons, correcting and reforming the churches, and consecrating, and sowing the word of life in the lord's field. *Ath. 56.* How often, and in what order.

Visitation.

And, regularly, the order to be observed therein is this : In a diocesan visitation, the bishop is first to visit his cathedral church ; afterwards, the diocese : In a metropolitical visitation, the archbishop is first to visit his own church and diocese ; then in every diocese to begin with the cathedral church, and proceed thence as he pleaseth to the other parts of the diocese. Which appears from abundance of instances in the ecclesiastical records, as well of papal dispensations for the archbishop to visit without observing the said order, as of episcopal licences for the visitor to begin in other parts of the diocese than in the cathedral church. *Gibf. 957.*

And this sprang from the precept of the canon law, which requires, that the archbishop willing to visit his province, shall first visit the chapter of his own church, and city, and his own diocese : And after he hath once visited all the dioceses of his province, it shall be lawful for him (having first required the advice of his suffragans, and the same being settled before them, which shall be put in writing that all may know thereof) to visit again, according to the order aforesaid, altho' his suffragans shall not assent thereunto. And the like form of visiting observed by the archbishops, shall be observed also by the bishops in their ordinary visitations. *Id.*

By *Can. 60.* for the office of confirmation, it is enjoined, that the bishop shall perform that office in his visitation every third year ; and if in that year, by reason of some infirmity, he be not able personally to visit, then he shall not omit the same the next year after, as he may conveniently.

Upon which Dr Gibson observeth, that by the ancient canon law, visitations were to be once a year : but it is to be noted, that those canons were intended of parochial visitations, or a personal repairing to every church ; as appears, not only from the assignment of procurations (originally in provisions and afterwards in money) for the reception of the bishop ; but also by the indulgence which the law grants in special cases, where every church cannot be conveniently repaired to, of calling together the clergy and laity from several parts unto one convenient place, that the visitation of them may not be postponed. From this indulgence, and the great extent of the dioceses, grew the custom of citing clergy and people to attend visitations at particular places ; the times of which visitations, as they are now usually fixed about Easter and Michaelmas, have evidently sprung from the two yearly synods of the clergy, which the canons of the church required to be held by every bishop about those two seasons, to consider of the state of the church and religion within the respective dioceses : an end, that is also answered by the presentments that are there made concerning the manners of the people ; as they used to be made to the bishop at his visitation of every particular church. But as to parochial visitation, or the inspection into the fabricks mansions utensils and ornaments of the church, that care hath been long devolved upon the archdeacons ; who at their first institution in the ancient church were only to attend the bishops at their ordinations, and other publick services in the cathedral ; but being afterwards occasionally employed by them in the
exercise

exercise of jurisdiction, not only the work of parochial visitation, but also the holding of general synods or visitations when the bishop did not visit, came by degrees to be known and established branches of the archidiaconal office as such; which by this means attained to the dignity of ordinary, instead of delegated jurisdiction. And by these degrees came on the present law and practice of triennial visitations by bishops; so as the bishop is not only not obliged by law to visit annually, but (what is more) is restrained from it. *Gibbs. 958.*

Lindwood says, the archdeacon, altho' there be not a cause, may visit once a year: but if there be cause he may visit oftner. Nor doth it hinder, where it is said in the canon law, that he ought to visit from three years to three years; for this is to be understood so that he shall visit from three years to three years of necessity, but he may visit every year if he will. *Lind. 49.*

4. In the bishop's triennial, as also in visitations regal and metropolitcal, all inferior jurisdictions, respectively, are inhibited from exercising jurisdiction, during such visitation. And we find in the time of archbishop Winchelsey, a bishop prosecuted, for exercising jurisdiction, before the relaxation of the inhibition; and in archbishop Tillotson's time, a bishop suspended, for acting after the inhibition. And even matters begun in the court of the inferior ordinary (whether contentious or voluntary) before the visitation of the superior, are to be carried on by the authority of such superior. *Gibbs. 958.*

Inhibition during the time of visitation.

However, it hath been not unusual, especially in metropolitical visitations, to indulge the bishops and inferior courts, in whole or in part, in the exercise of jurisdiction, pending the visitation. Thus, we find relaxations granted, pending the visitation, by archbishop Abbot; and, by others, an unlimited leave or commission, to exercise jurisdiction, or proceed in causes, notwithstanding the visitation; and elsewhere, a leave to confer orders, confirm, grant fiats for institution, institute, or correct, whilst the inhibition continued in other respects. *Id.*

After the relaxation of the inhibition, and especially in metropolitical visitations, we find not only reservations of power to rectify and punish the *comperta et detecta*, but also special commissions issued for that end.

5. *Can. 125.* All chancellors, commissaries, archdeacons, officials, and all others exercising ecclesiastical jurisdiction, shall appoint such meet places for the keeping of their courts, by the assignment or approbation of the bishop of the diocese, as shall be convenient for entertainment of those that are to make their appearance there, and most indifferent for their travel: And likewise they shall keep and end their courts in such convenient time, as every man may return homewards in as due season as may be. Where.

6. *Langton.* The archdeacons in their visitation shall see that the offices of the church be duly administred; and shall an account in writing of all the ornaments and utensils of the churches, and also of the vestments and books; which they shall cause to be presented before them every year for their inspection, that they may see what have been added, or what have been lost. *Lind. 50.* General power of the visitors.

Visitation.

Account in writing] And it would be well to have the same indented: one part to remain with the archdeacon, and the other with the parishioners. *Lind. 50.*

Utenfils] That is, which are fit or necessary for use: and by these are understood all the vessels of the church of every kind. *Lind. 50.*

Every year] That is, every year in which they shall visit. *id.*

That they may see] Therefore the archdeacon ought to go to the place in person to visit, and not to send any other; which if he do, he shall not have the procurations (due upon the account of visiting) in money; but otherwise, he whom he shall send shall receive procurations for himself and his attendants in victuals. *Lind. 50.*

Otho. Concerning archdeacons we do ordain, that they visit the churches profitably and faithfully; by inquiring of the sacred vessels, and vestments, and how the service is performed, and generally of temporals and spirituals: and what they shall find to want correction, that they correct diligently. And when they visit, correct, or punish crimes, they shall not presume to take any thing of any one (save only moderate procurations), nor to give sentence against any persons unjustly, whereby to extort money from them. For whereas these and such like things do favour of simony, we decree, that they who do such things shall be compelled by the bishop to lay out twice as much for pious uses; saving nevertheless other canonical punishment against them. And they shall endeavour frequently to be present at the chapters in every deanry, and therein instruct the clergy (amongst other things) to live well, and to have a sound knowledge and understanding in performing the divine offices. *Atton 52.*

Chapters] That is, rural chapters. *Atton 54.*

Reynolds. We injoin the archdeacons and their officials, that in the visitation of churches they have a diligent regard to the fabrick of the church, and especially of the chancel, to see if they want repair: and if they find any defects of that kind, they shall limit a certain time under a penalty within which they shall be repaired. Also, they shall inquire by themselves or their officials, in the parishes where they visit, if there be ought in things or persons which wanteth to be corrected; and if they shall find any such, they shall correct the same either then or in the next chapter. *Lind. 53.*

And their officials] Here it seemeth to be intimated, that the archdeacon's official may visit; which yet is not true, at least in his own right; yet he may do this in the right of the archdeacon, when the archdeacon himself is hindered. *Lind. 53.*

Stratford. Forasmuch as archdeacons and other ordinaries in their visitations, finding defects as well in the churches as in the ornaments thereof and the fences of the churchyard and in the houses of the incumbents, do command them to be repaired under pecuniary penalties, and from

from those that obey not do extort the said penalties by censures, where- with the said defects ought to be repaired, and thereby enrich their own purses to the damage of the poor people; therefore that there may be no occasion of complaint against the archdeacons and other ordinaries and their ministers by reason of such penal exactions, and that it becometh not ecclesiastical persons to gape after or enrich themselves with dishonest and penal acquisitions, we do ordain, that such penalties, so often as they shall be exacted, shall be converted to the use of such repairs, under pain of suspension ab officio which they shall ipso facto incur until they shall effectually assign what was so received to the reparation of the said defects. *Lind. 224.*

Can. 86. Every dean, dean and chapter, archdeacon, and others which have authority to hold ecclesiastical visitations by composition, law, or prescription, shall survey the churches of his or their jurisdiction, once in every three years, in his own person, or cause the same to be done; and shall from time to time within the said three years certify the high commissioners for causes ecclesiastical, every year, of such defects in any the said churches, as he or they do find to remain unrepaired, and the names and surnames of the parties faulty therein. Upon which certificate we desire the said high commissioners will ex officio mero send for such parties, and compel them to obey the just and lawful decrees of such ecclesiastical ordinaries making such certificates.

Note, since the making of these canons, the high commission court was abolished by act of parliament.

7. In the year 1626, Mr Huntley, rector of Stourmouth, was re- Visitation
quired by Dr Kingsley archdeacon of Canterbury, to preach a visitation sermon.
sermon; which he refused. And being cited before the high commis-
sioners, it was urged, that he was bound to the performance of that office
in pursuance of the archdeacon's mandate, by virtue of his oath of cano-
nical obedience. He answered, that he was not a licensed preacher, ac-
cording to the canons of 1603; and especially, that he was not bound
thereunto by his said oath, which implieth only an obedience according
to the canon law, as it is in force in this realm; and that there is no canon,
foreign or domestic, which requireth him to do this; but on the contrary,
that the ancient canon law injoineth the visitor himself to preach at his own
visitation. But the court admonished him to comply; and on his refusal,
fined him 500 l, and imprisoned him till he should pay the same and
also make submission; and afterwards degraded and deprived him.
Johns. Huntley's case.

But this perhaps may be one instance, amongst others charged against
that court whilst it subsisted, of carrying matters with a pretty high hand.

And Dr Ayliffe observes from the sixth book of the Decretals, that
amongst the orders to be observed by archbishops bishops and others in
their visitations, the first is, that they ought to preach the word of god,
by giving the congregation a sermon. *Ayl. Par. 515.*

Nevertheless,

Nevertheless, it is presumed, very few clergymen would refuse to discharge the offices of their function on the like occasion, at the request or intimation of their superior.

Exhibits.

8. *Can.* 137. Forasmuch as a chief and principal cause and use of visitation is, that the bishop archdeacon or other assigned to visit, may get some knowledge of the state sufficiency and ability of the clergy, and other persons whom they are to visit: We think it convenient, that every parson, vicar, curate, schoolmaster, or other person licensed whosoever, do at the bishop's first visitation, or at the next visitation after his admission, shew and exhibit unto him his letters of orders, institution, and induction, and all other his dispensations, licences, or faculties whatsoever, to be by the said bishop either allowed, or (if there be just cause) disallowed and rejected; and being by him approved, to be (as the custom is) signed by the register: and that the whole fees accustomed to be paid in the visitations in respect of the premisses, be paid only once in the whole time of every bishop, and afterwards but half of the said accustomed fees, in every other visitation, during the said bishop's continuance.

To be by the said bishop allowed] None but the bishop, or other person exercising ecclesiastical authority by commission from him, hath right de jure communi to require these exhibits of the clergy; nor doth the enacting part of this canon convey the right to any other; and therefore, if any archdeacons are intitled to require exhibits in their visitations, it must be upon the foot of custom; the beginning whereof hath probably been an incroachment; since it is not likely, that any bishop should give to the archdeacon and his official a power of allowing or disallowing such instruments as have been granted by himself or his predecessors. *Gibf.* 959.

Whole fees] In the registry of archbishop Islip, there is a sequestration of the benefices of divers clergymen refusing to make due exhibits in a visitation. *Gibf.* 1545.

And afterwards but half of the said accustomed fees] Lindwood speaking of the letters of orders to be exhibited by stipendiary curates going from one diocese to another, saith, that after the archdeacon or his official or other ordinary hath satisfied himself of their orders and of their life and conversation, they may be admitted to officiate, and their names ought to be entred in the register of such ordinary; whereupon in other visitations or inquiries their letters of orders ought not to be reinspected, nor their names to be entred again, seeing they are sufficiently known already: And so they do ill (he says) who in every of their visitations take something for the inspection and approbation of the said letters of orders; seeing such entry ought not to be made but once, namely, at the first admission. *Lind.* 225. *Gibf.* 959.

Presentments,
by whom to
be made.

9. *Edm.* There shall be in every deanry two or three men, having god before their eyes, who shall at the command of the archbishop or his official, present unto them the publick excesses of prelates and other clerks. *Lind.* 277.

In every deanry] That is, in every rural deanry. *Lind.* 277.

Publick excesses] That is, notorious, whereof there is great and publick infamy; and this, altho' the same be not upon oath: but if such excesses shall not be notorious, then the same shall not be presented, unless there be proof upon oath. *Lind.* 277.

As to the churchwardens duty in this particular, altho' they have for many hundred years been a body corporate, to take care of the goods repairs and ornaments of the church, as appears by the ancient register of Writs; yet this work of presenting hath been devolved on them and their assistants, by canons and constitutions of a more modern date. Anciently, the way was, to select a certain number at the discretion of the ordinary, to give information upon oath; which number the rule of the canon law upon this head evidently supposeth to have been selected while the synod was sitting, and the people as well as clergy in attendance there. But in process of time this method was changed; and it was directed in the citation, that four six or eight, according to the proportion of the district, should appear (together with the clergy) to represent the people, and to be the *testes synodales*. *Gibf.* 960.

But all this while we find nothing of churchwardens presenting, but the style of the books is, *The parishioners say*, *The laymen say*, and the like, until a little before the reformation, when the churchwardens began to present, either by themselves, or else with two or three more parishioners of credit joined with them. And this last (by the way) is evidently the original of that office, which our canons do call the office of sidemen or assistants. *Gibf.* 960.

In the beginning of the reign of king James the first, a commissary had cited many persons of several parishes, to appear before him at his visitation; and because they appeared not, they were excommunicated. But a prohibition was granted; because the ordinary hath not power to cite any into that court, except the churchwardens and sidemen. *Noy* 123.

But by *Can.* 113. Because it often cometh to pass, that churchwardens, sidemen, questmen, and such other persons of the laity as are to take care for the suppressing of sin and wickedness, as much as in them lieth, by admonition, reprehension, and denunciation to their ordinaries, do forbear to discharge their duties therein, either thro' fear of their superiors, or thro' negligence, more than were fit, the licentiousness of these times considered; we do ordain, that hereafter every parson and vicar, or in the lawful absence of any parson and vicar, then their curates and substitutes may join in every presentment with the said churchwardens sidemen and the rest abovementioned, at the times of visitation, if they the said churchwardens and the rest will present such enormities as are apparent in the parish; or if they will not, then every such parson and vicar, or in their absence as aforesaid their curates, may themselves present to their ordinaries at such times, and when else they think it meet, all such crimes as they have in charge or otherwise, as by them (being the persons that should have the chief care for the suppressing of sin and impiety in their parishes)

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parishes) shall be thought to require due reformation. Provided always, that if any man confess his secret and hidden sins to the minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him, we do not any way bind the said minister by this our constitution, but do straitly charge and admonish him, that he do not at any time reveal and make known to any person whatsoever, any crime or offence so committed to his trust and secrecy (except they be such crimes as by the laws of this realm his own life may be called in question for concealing the same) under pain of irregularity.

And by *Can. 116.* it shall be lawful for any godly disposed person, or for any ecclesiastical judge, upon knowledge or notice given unto him or them, of any enormous crime within his jurisdiction, to move the minister churchwardens or sidemen, as they tender the glory of god and reformation of sin, to present the same, if they shall find sufficient cause to induce them thereunto, that it may be in due time punished and reformed.

Provided, that for these voluntary presentments there be no fee required or taken.

To be made
upon oath.

10. *Boniface.* We do decree, that laymen, when inquiry shall be made by the prelates and judges ecclesiastical for correcting the sins and excesses of those that are within their jurisdiction, shall be compelled (if need be) to take an oath to speak the truth. *Lind. 109.*

And that ordinaries are impowered by the laws of the church to require an oath of the testes synodales, appears, not only from this constitution, but also from the body of the canon law. And the same practice of administering an oath, appears in the ecclesiastical records of our own church; where it is often entred, that the presenters were charged upon their consciences, to discover whatever they knew to want amendment in things and persons. *Gibf. 960.*

Articles of
inquiry.

11. *Can. 119.* For the avoiding of such inconveniencies as heretofore have happened, by the hasty making of bills of presentments upon the days of visitation and synods, it is ordered, that always hereafter, every chancellor, archdeacon, commissary, and official, and every other person having ecclesiastical jurisdiction at the ordinary time when the churchwardens are sworn, and the archbishop and bishops when he or they do summon their visitation, shall deliver or cause to be delivered to the churchwardens questmen and sidemen of every parish, or to some of them, such books of articles as they or any of them shall require (for the year following) the said churchwardens questmen and sidemen to ground their presentments upon, at such times as they are to exhibit them. In which book shall be contained the form of the oath which must be taken immediately before every such presentment: to the intent that having beforehand time sufficient, not only to peruse and consider what their said oath shall be, but the articles also whereupon they are to ground their presentments, they may frame them at home both advisedly and truly, to the discharge of their own consciences (after they are sworn), as becometh honest and godly men.

Frame them at home] By an entry in one of our records about 200 years ago, the ancient way of making presentments seems to have been, the ordinary's examination of the synodal witnesses, and the taking their detections and presentments by word of mouth, and then immediately entring them in the acts of the visitation. And altho' presentments are now required to be framed at home, there is no doubt but every visitor hath the same right of personal examination that ancient visitors had, as often as he shall find occasion. *Gibf.* 963.

By reason of several disputes which have been made concerning the articles of inquiry, the convocation hath sometimes attempted to frame one general body of articles for visitations; but the same as yet hath not been brought to effect. *Gibf.* 962.

12. *Can.* 115. Whereas for the reformation of criminous persons and disorders in every parish, the churchwardens questmen sidemen and such other church officers are sworn, and the minister charged, to present as well the crimes and disorders committed by the said criminous persons, as also the common fame which is spread abroad of them, whereby they are often maligned and sometimes troubled by the said delinquents or their friends; we do admonish and exhort all judges both ecclesiastical and temporal, as they regard and reverence the fearful judgment seat of the highest judge, that they admit not in any of their courts, any complaint plea suit or suits, against any such churchwardens questmen sidemen or other church officers, for making any such presentments, nor against any minister for any presentments that he shall make: all the said presentments tending to the restraint of shameless impiety, and considering that the rules both of charity and government do presume that they did nothing therein of malice, but for the discharge of their consciences.

But there is more danger now, than when these canons were made, of actions being brought against churchwardens for presenting upon common fame; because the person accused in those days was required to answer upon oath to the charge laid against him, and to bring his compurgators: but the oath *ex officio* being now abolished, it seemeth not safe, to present any person upon common fame only, without proof.

And even when the oath of purgation was in force, Mr Clerke gives a caution, that all, both churchwardens and others, take care, how they accuse or present any person for any crime, or fame thereof, unless they can prove either the crime, or that the fame thereof arose from just causes and strong presumptions. Therefore, altho' the fame or rumor of any crime hath been spread amongst many and good men, yet if it had its beginning from enemies or evil minded persons, or (as is often the case) from the sole accusation of a woman confessing her own turpitude, the presentment or accusation in such case ought not to be general, but particular, that is, that such a fame or rather rumor was spread by such persons, or by the accusation or confession of such woman in childbirth confessing her own baseness: And then, if the person accused shall proceed against the accuser in a cause of defamation, he shall fail in his

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suit, if proof shall be made that there was such a fame or rumor as was set forth in the presentment. *1 Ought. 236.*

Presentment
in what man-
ner to be
made.

13. It is not enough to present that such a one hath committed fornication, or the like; but the person ought to be named with whom he committed the offence, and that there is a publick fame thereof: otherwise upon such a general and uncertain presentment, the person accused cannot know how to make his defence, and there may be cause of appeal. *1 Ought. 229.*

At what times
to be made.

14. *Can. 116.* No churchwardens, questmen, or sidemen of any parish, shall be enforced to exhibit their presentments to any having ecclesiastical jurisdiction, above once in every year where it hath been no oftner used, nor above twice in any diocese whatsoever, except it be at the bishop's visitation: Provided always, that as good occasion shall require, it shall be lawful for every minister churchwardens and sidemen, to present offenders as oft as they shall think meet; and for these voluntary presentments, no fee shall be taken.

Can. 117. No churchwardens questmen or sidemen shall be called or cited, but only at the said time or times before limited, to appear before any ecclesiastical judge whosoever, for refusing at other times to present any faults committed in their parishes, and punishable by ecclesiastical laws. Neither shall they or any of them, after their presentments exhibited at any of those times, be any further troubled for the same, except upon manifest and evident proof it may appear, that they did then willingly and wittingly omit to present some such publick crime or crimes as they knew to be committed, or could not be ignorant that there was then a publick fame of them, or unless there be very just cause to call them for the explanation of their former presentments: In which case of wilful omission, their ordinaries shall proceed against them in such sort, as in causes of wilful perjury in a court ecclesiastical it is already provided.

Can. 118. The office of all churchwardens and sidemen shall be reputed to continue, until the new churchwardens that shall succeed them be sworn, which shall be the first week after easter, or some week following, according to the direction of the ordinary; which time so appointed shall always be one of the two times in every year, when the minister and churchwardens and sidemen of every parish shall exhibit to their several ordinaries, the presentments of such enormities as have happened in their parishes since their last presentments. And this duty they shall perform, before the newly chosen churchwardens and sidemen be sworn, and shall not be suffered to pass over the said presentments to those that are newly come into that office, and are by intendment ignorant of such crimes; under pain of those censures which are appointed for the reformation of such dalliers and dispensers with their own consciences and oaths.

Fee for taking
in present-
ments.

15. *Can. 116.* For the presentments of every parish church or chapel, the register of any court where they are to be exhibited, shall not receive in one year above 4d; under pain, for every offence therein, of suspension from the execution of his office for the space of a month toties quoties.

16. Besides

16. Besides being proceeded against by the censures of the church; it is enjoined by *Can. 26.* that no minister shall in any wise admit to the receiving of the holy communion, any churchwardens or sidemen, who having taken their oaths to present to their ordinaries all such public offences as they are particularly charged to inquire of in their several parishes, shall (notwithstanding their said oaths, and that their faithful discharge of them is the chief means whereby publick sins and offences may be reformed and punished) wittingly and willingly, desperately and irreligiously, incur the horrible crime of perjury; either in neglecting, or in refusing, to present such of the said enormities and publick offences, as they know themselves to be committed in their said parishes, or are notoriously offensive to the congregation there; altho' they be urged by some of their neighbours, or by their minister, or by the ordinary himself, to discharge their consciences by presenting of them, and not to incur so desperately the said horrible sin of perjury.

Penalty for not presenting.

H. 1680. Selby's case. A prohibition was prayed to the archdeacon of Exeter, because he proceeded to excommunicate the plaintiff, for that he, being churchwarden, refused to present a notorious delinquent, being admonished. And a prohibition was granted: for they are not to direct the churchwarden to present at their pleasure; but if one churchwarden doth refuse to present, he may be presented by his successor. *Freem. 298.*

17. *Can. 121.* In places where the bishop and archdeacon do by prescription or composition visit at several times in one and the same year; lest for one and the self same fault any of his majesty's subjects should be challenged and molested in divers ecclesiastical courts, we do order and appoint, that every archdeacon or his official, within one month after the visitation ended that year, and the presentments received, shall certify under his hand and seal, to the bishop or his chancellor, the names and crimes of all such as are detected and presented in his said visitation, to the end the chancellor shall thenceforth forbear to convent any person for any crime or cause so detected or presented to the archdeacon. And the chancellor, within the like time after the bishop's visitation ended and presentments received, shall under his hand and seal signify to the archdeacon or his official, the names and crimes of all such persons, which shall be detected or presented unto him in that visitation, to the same intent as is aforesaid. And if these officers shall not certify each other as is here prescribed, or after such certificate shall intermeddle with the crimes or persons detected and presented in each other's visitation; then every of them so offending shall be suspended from all exercise of his jurisdiction, by the bishop of the diocese, until he shall repay the costs and expences which the parties grieved have been at by that vexation.

None to be presented twice for the same offence.

18. Crimes evident and notorious, whether they be immoralities in persons, as lewdness, swearing, drunkenness, and such like; or defects in places, as the want of repairs, or of utensils, in churches, churchyards, and parsonage houses; are not only in their nature merely spiritual and ecclesiastical, but in the chief heads thereof (as fornication, adultery, and the repairing of churches and churchyards) by the statute of *Circumspecte agatis*, 13 *Ed. 1.* not liable to prohibition: And therefore if offenders,

Churchwardens to support their presentments.

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being presented, do escape unpunished, it must be owing either to the want of proof, or the want of prosecution. *Gibf. 966.*

As to legal proof; in case the party presented denies the fact to be true, the making good the truth of the presentment, that is, the furnishing the court with all proper evidences of it, undoubtedly rests upon the person presenting. And as the spiritual court, in such case is intitled by law to call upon churchwardens to support their presentments; so are churchwardens obliged, not only by law (*Dr Gibson* says), but also in conscience, to see the presentment effectually supported; because to deny the court those evidences which induced them to present upon oath, is to desert their presentment, and is little better in point of conscience, than not to present at all; inasmuch as thro' their default the presentment is rendered ineffectual, as to all purposes of removing the scandal, or reforming the offender. And from hence he takes occasion to wish, that the parishioners would think themselves bound (as on many accounts they certainly are bound) to support their churchwardens, in seeing that their presentments are rendered effectual. In any point which concerns the repairs or ornaments of churches, or the providing conveniences of any kind for the service of god, when such defects as these are presented, the spiritual judge, immediately, and of course, enjoins the churchwarden presenting, to see the defect made good, and supports him in repaying himself, by a legal and reasonable rate upon the parish. But what he intends is, the supporting the churchwardens in the prosecution of such immoral and unchristian livers, as they find themselves obliged by their oath to present, as fornicators, adulterers, common swearers, drunkards, and such like; whose example is of pernicious consequence, and likely to bring many evils upon the parish. *Id.*

Procurations.

19. In all visitations of parochial churches made by bishops and archdeacons, the law hath provided, that the charge thereof shall be answered by the procurations then due and payable by the inferior clergy; wherein custom, as to the quantum, shall prevail. *God. Introd. 19.*

Anciently by provisions in kind.

20. These procurations were anciently made, by *procuring* victuals and other provisions in specie; concerning which, the following constitutions have been ordained:

Langton. We forbid archdeacons, deans, and their officials, to make any exactions upon their clergy. *Lind. 221.*

Langton. That archdeacons may not be burdensome to the churches subject unto them, we strictly injoin, that they do not exceed the number of horses and men prescribed by the general council; and that they do not presume to invite strangers with them to the procuration made for them on account of their visitation. But if the rectors of the churches, in honour of the archdeacon, will invite any, we do not forbid it. But the archdeacons themselves shall invite none, lest they who would not burden the churches by their own coming, should yet burden them by those whom they should invite. And that there may be no occasion to invite any, we do forbid the archdeacons to hold any chapter on the day of visitation at the church which they visit, unless it be in a borough or city. And we injoin the archdeacons, that they do not in any wise receive

ceive procuration without reasonable cause, but only on the day when they personally visit the church; and that they do not extort money from the church as a fee or ransom for not visiting. *Lind.* 219.

Prescribed by the general council] That is to say, five or six: but herein a regard ought to be had to the custom of the country or place. *Lind.* 220.

In any wise] That is, neither in victuals, nor money, nor any thing in lieu thereof. *id.*

Personally visit] But yet, if thro' infirmity or any other lawful cause, the archdeacon be hindred from visiting in person, he may exercise the office by another; and in such case the procurations shall be paid. *id.* 221.

Otho. The archdeacons shall not burden the churches with superfluous expences, but only require moderate procurations when they visit; and shall not bring strangers with them, but demean themselves modestly both in regard to their attendants and their horses. *Atton* 53.

Othob. The church visited ought in reason to entertain the visitor: but where no visitation is, there shall be no procuration; and if any person shall take any thing, he shall be suspended from the entrance of the church, until he make restitution. And the bishops and other inferior prelates, when they visit, shall not burden the clergy with a superfluous number of attendants or horses or otherwise in expences; and if they do, the clergy shall not obey them in that behalf; and any sentences of excommunication, suspension, or interdict, on occasion thereof, shall be void. *Atton* 114.

Stratford. No procuration shall be due, without actually visiting: And if any shall visit more churches than one in one day, he shall have but one procuration, to be proportioned amongst the said churches. And because sometimes the retinue of a visitor exceedeth the number of men and horses appointed by the canons, so that they who pay their procurations in victuals are excessively burdened beyond the rate which is usually paid in money; it shall be in the choice of the visited, to pay the same in money or in provisions. *Lind.* 223.

21. And this last constitution, by putting it in the choice of the incumbent, whether he would entertain the visitor in provisions, or compound for it by a certain sum of money, was the cause of the custom generally prevailing afterwards, and which now universally obtaineth, of a fixed payment in money, instead of a procuration in meat, drink, provender, and other accommodation. *Gibf.* Tracts. 13.

22. Procuration is due to the person visiting, of common right: and altho' originally due by reason of visitation only, yet the same may be due without actual visitation. The foregoing constitutions limit the payment, whether in provisions or money, to actual visitation, and warrant the denial of them when no visitation is held. Upon which a doubt hath been raised, whether those archdeacons who are not permitted to visit, but are inhibited from doing it in the bishop's triennial visitation, have a right to require procurations for that year. They who have maintained the negative,

Now converted into money.

Whether due when no visitation is made.

negative, build their opinion upon the express letter both of the ancient canon law, and of our own provincial constitutions. But others, who undertake to defend the rights of the archdeacons alledge, that tho' it might be reasonable that they lose their procurations, in case they neglect their office of visiting (which, by the way, was all that the ancient constitutions meant), yet that reason doth not hold when they are restrained and inhibited from it; and that procurations are rated in the valuation of king Henry the eighth, as part of the revenues of every archdeacon, who therefore pays a certain annual tenth for them; and the law could never intend the payment of the tenth part every year, if there had been any year in which he was not to receive the nine parts. Which two arguments (Dr Gibson says) are so strong in favour of the archidiaconal rights, the first in reason, and the second in law as well as reason, that no more need to be said upon that head. *Gibf.* 975.

To be sued
for in the spi-
ritual court.

23. Procurations are suable only in the spiritual court, and are merely an ecclesiastical duty. *L. Raym.* 450.

And may be levied by sequestration, or other ecclesiastical process. *Gibf.* 1546.

To be paid by
rectories im-
propriate
where there is
no vicar en-
dowed.

24. *E. 7 G. Saunderson and Clagett.* Dr Clagett, archdeacon of Sudbury, commenced a suit in the consistory court of the bishop of Norwich, against Saunderson as proprietor or curate of the impropriate rectory of Aspal in Suffolk, for the annual sum of 6s 8d as a procuration or proxy due to the archdeacon for visitations. Saunderson moved the court of king's bench for a prohibition; and suggested that this rectory of Aspal was time out of mind a rectory impropriate, without any vicar endowed; that all the tithes and profits within this rectory time out of mind belonged to the proprietor thereof, who at his own expence used to provide a curate to celebrate divine service at the parish church of Aspal. But it was denied by the whole court, who delivered their opinions seriatim; 1. That this was an ecclesiastical duty, and therefore properly suable for in the spiritual court. 2. That it was claimed both by and from an ecclesiastical person, which made it the stronger. 3. That tho' there was an impropriation in the case, still there must be a curate, to take care of the souls of the parishioners; and that curates as well as other persons must stand in need of bishops or archdeacons instructions and visitations. Consequently, 4. That the ordinary or archdeacon ought to be allowed for his procuration, what had been usually paid for it, which here appeared to be 6s 8d. 5. That where a thing is claimed by custom in the spiritual court, it must be intended according to their construction of a custom; and by their law, forty years make a custom or prescription. *1 Peere W.* 657. *Str.* 421.

Impropriate
rectory where
there is a vicar
endowed.

Chapel of ease
under a par-
chial church.

25. If there be a parsonage and a vicarage endowed; only one is to pay procurations: but which of them must pay is to be directed by custom, or the endowment if extant. *Deg.* p. 2. c. 15.

26. *Stratford.* A chapel of ease shall be included in the procuration of the mother church. *Lind.* 223. *Deg.* p. 2. c. 15.

27. Churches newly erected shall be rated to procurations, according to the proportion paid by the neighbouring churches. *Gibf.* 976. Churches newly erected.
28. Donatives and free chapels pay no procurations to any ecclesiastical ordinary, because they are not visitable by any. *Deg.* p. 2. c. 15. Places exempted.
- Places exempted, as to other matters, are treated of under the title **Peculiars.**

Synodals or *cathedratica*, and *pentecostals*, are treated of under their respective titles.

Visitation of the sick. See **Sick.**

Uniformity. See **Publick worship.**

Union.

1. **T**HE union or consolidation of churches ought to be founded upon good canonical reasons. And the principal reasons assigned by the canon law are, for hospitality, nearness of the places, want of inhabitants, poverty or smallness of the living. Which circumstances are specially inquired into before the union, and (some, or all of them, as the case is) are recited in the preamble to the act of union. *Gibf.* 920. Causes of union.
2. And in such case, by the common law of the realm, the ordinaries, patrons, and incumbents may make a consolidation or an union of the two churches into one. *1 Salk.* 165. *Hughes* c. 28. Who may unite.

And in such case, it is said, that the consent of the king is not at all necessary, albeit he hath an interest in the churches in the case of lapse. For by the ancient canon law, the licence of the pope was not necessary; nor hath the licence of the king been judged necessary since the reformation; inasmuch as unions have been ordinarily made without such licence; however, in some few instances, it may have been desired and obtained for the greater caution. *Cro. Eliz.* 500. *Gibf.* 916, 920. *Watf.* c. 16.

3. By the 37 *H.* 8. c. 21. An union or consolidation of two churches in one, or of a church and chapel in one, the one of them not being above the yearly value of 6l in the king's books, and not distant from the other above one mile, may be made by the assent of the ordinary and ordinaries of the diocese where such churches and chapels stand, and by the assents of the incumbents of them, and of all such as have a just right title and interest to the patronages of the same churches and chapels, being then of full age; which unions and consolidations so made, shall be good and available in the law, to continue for ever, in such manner and form, as by writing or writings under the seal of such ordinaries, incumbents, and patrons shall be declared and set forth. Restraint of union by statute.

Provided, that where the inhabitants of any such poor parish, or the more part of them, within one year next after the union or consolidation of the same parish, by their writing sufficient in the law, shall assure the incumbent of the said parish for the yearly payment of so much money, as with the sum that the said parish is rated and valued at in the court of first fruits and tenths, shall amount to the full sum of 8 l, to be levied and paid yearly by the said inhabitants to the said incumbent and his successors; all such unions or consolidations made of any such poor parish as aforesaid, shall be void and of none effect.

In towns corporate.

4. By the same statute, it is provided, that all unions and consolidations to be made of any church or chapel within any city or town corporate, without the assent of the mayor sheriffs and commonalty of such city, or without the assent of the body corporate of other towns corporate, by the names of their corporations in writing under their common seal, shall be void.

And by the 17 C. 2. c. 3. Forasmuch as the settled provision for ministers in most cities and towns corporate is not sufficient for the maintenance of able ministers fit for such places, whereby mean and stipendiary preachers are entertained to serve the cures there; who wholly depending for their maintenance upon the good will and liking of their auditors, have been and are hereby under temptation of too much complying, and suiting their doctrine and teaching to the humour rather than good of their auditors; which hath been a great occasion of faction and schism, and of the contempt of the ministry: it is enacted, that in every city or town corporate and their liberties, which have a mayor and aldermen, and particular justices of the peace by charter or commission, or bailiff or bailiffs, or other chief officer or officers, and other assistants, by like charter; and where two or more churches or chapels, or a church and a chapel, and the parishes thereunto belonging, do lie within the said corporation or liberties thereof, convenient to be united; in such cases the bishop of the diocese where such parish or parishes are, with the consent of the mayor aldermen, and justices of the peace, bailiff or bailiffs, or other chief officer or officers, or the major part of them, and of the patron or patrons of such churches or chapels, shall or may according to due form of law unite the said churches or chapels, or any of them; and shall appoint at which of them the parishioners and inhabitants shall usually meet for the worship of god, and which of them shall be united and annexed unto the other, which shall be the church presentative, unto which all presentations shall thereafter be only made, and unto which the parishioners shall resort as their proper church; and after such order made, the said churches or chapels shall accordingly for ever stand united. And the parishioners, landholders, and inhabitants shall, as any of them become void, from thenceforward pay all such tithes and other duties, as did belong to the incumbent of any of the churches or chapels so united and annexed, unto the incumbent of the said presentative church or chapel, unto which such other shall be so united and annexed as aforesaid.

But notwithstanding any such union to be made by virtue hereof, each of the parishes so united shall continue distinct as to all rates, taxes, parochial rites, charges, and duties, and all other privileges, liberties, and respects whatsoever, other than what is herein before mentioned and specified; and churchwardens shall be elected and appointed for each parish, as they were before such union made.

And where one or more of the said churches or chapels so united, shall be full at the time of making such union; the said union shall take effect for every such church or chapel, upon the first avoidance after such union made.

And the several patrons shall present by turns to that church only, which shall remain and be presentative from time to time, in such order as the said bishop, with the consent of the said mayor, aldermen, and justices of the peace, bailiff or bailiffs, or other chief officer or officers within such parishes, or the major part of them, and of the patron or patrons of such churches or chapels, shall determine and decree for the preservation of their respective rights therein, respect being therein had to the differences of the values of the yearly maintenance belonging to such churches or chapels, or any of them.

Saving to the king all the tenths and first fruits of all such churches and chapels so to be united, according to their rates and valuations in the office of first fruits and tenths: and also reserving all procurations and pensions to all persons to whom they are and have been or shall be due and payable.

Provided, that no union of parishes or places to be made by virtue of this act, shall commence or be effectual in law, until it be registred in the register book of the bishop of the diocese; which the register is hereby required to do.

Provided, that no union made by virtue hereof, shall be good and effectual, where the settled maintenance belonging to the parsons vicars and incumbents of the church or chapel, or churches or chapels so united, shall exceed the sum of 100*l* a year, clear and above all charges and reprises; unless the respective parishioners, or the major part of them, under their hands desire otherwise.

Provided, that every minister settled as aforesaid incumbent of any church or chapel, or churches and chapels, united according to this act, shall be full and lawful incumbent thereof to all intents and purposes: so as such minister be a graduate in one of the universities of this kingdom.

And by the 4 *W. c.* 12. Where one of the churches united by virtue of the said last mentioned act, was at the time of such union, or shall afterwards be demolished; in such case, as often as the church which is made the church presentative, and to which the union was made, shall be out of repair, or there shall be need of decent ornaments for the performance of divine service therein, the parishioners of the parish whose church shall then be down or demolished, shall bear and pay towards the charges of such repairs and decent ornaments, such share and proportion as the archbishop or bishop that shall make such union shall by the same

union direct and appoint; and for want of such direction and appointment, then one third part of such charges of the repairs and decent ornaments which shall be made or provided; and the same shall be rated taxed and levied, and in default thereof such process and proceedings shall be made, as if it were for the reparation and finding decent ornaments for their own parish church, if no such union had been made.

But if both churches are standing, then the repairs and ornaments shall be provided for, as they were at the common law; that is, by the parishioners of each parish respectively. *Gibf. 919.*

Union may
be in futuro.

5. Unions in futuro, as well as in præfenti, are good. And therefore if two churches are full, and one is duly united to the other in futuro, when either shall become void; the surviving incumbent may enter upon the void living, without any other title than that which he received from the act of union. *Gibf. 920.*

Presentation
to united be-
nefices.

6. By the union of two churches, no change is made in the advowsons: That is, not only all rights are reserved to the patron or patrons, as before, but the nature of the advowsons continues the same; as, if one be appendant, and the other in gross, and that which is appendant is made the presentative church, and the patron of the church in gross hath the first turn, yet shall not the whole advowson be in gross, but it shall remain appendant for his turn who was patron of the advowson in gross. Which being so, (that is, the advowsons, not only as to the right, but even as to the nature of them, remaining the same as before;) it seems to be an unreasonable doubt, whether bishops and other ecclesiastical persons can consent to an union by the statutes of the 1 *Eliz.* and 13 *Eliz.* *Gibf. 920. Watf. c. 16.*

Reparations.

7. Two churches parochial being united at the common law; the reparations shall remain several as before. Which was the reason, why the aforesaid act of the 4 *W.* was found necessary, to make it otherwise in the churches that had been or should be united in virtue of the statute of the 17 *Car. 2.* For before that, the inhabitants, even of a demolished church, were not obliged to contribute to the reparations of the church remaining, to which they were united. *Gibf. 921.*

Other pay-
ments and
duties.

8. The payment of first fruits and tenths, as before, are specially reserved in the aforesaid statutes: and the same, together with all other payments and duties to the bishop, archdeacon, and the like, and even the fees of institution, are reserved of course in perpetual unions, whether within the said statutes or not. *Gibf. 917.*

Effect of
union as to
pluralities.

9. By the union, the two churches are become so much one, that a second benefice may be taken by dispensation within the statute of pluralities. *Cro. Eliz. 729. Gibf. 920.*

Church united
to a prebend.

10. If a church parochial be united to a prebend in a cathedral church, and a clerk is collated to the prebend, and after installed in the cathedral, altho' that the parish church be not in the same diocese with the cathedral; yet the clerk thereby hath possession thereof, without any presentation, institution, or induction; because by the union, the parish church is become the corps of the prebend. *Watf. c. 16.*

11. After

11. After a union is made, if any question doth arise concerning the validity thereof; this may not be tried in the temporal, but only in the spiritual court: unless it be such union, as is restrained by the aforefaid statutes. *Watf. c. 16.* Union how tried.

Univerfity. See Colleges.

Voidance. See Avoidance.

Usurpation.

WHEN a stranger that hath no right, presenteth to a church, and his clerk is admitted and instituted, he is said to be an usurper, and the wrongful act that he hath done is called an usurpation. This is the definition given by lord Coke; and with regard to the first step towards an usurpation which he there mentions, viz. presenting, it is to be observed, that a presentation made by a stranger, if it be void in law (as in the case of simony, or of a presentation to a donative, or to a church that is full), makes no usurpation against the rightful patron; as neither doth a presentation, where between the usurper and the person upon whom the usurpation is made there is privity in blood, as in the case of coparceners; or privity in estate, as between lessor and lessee, grantor and grantee, joint-tenants, and tenants in common. In none of these cases, is the act of presenting the foundation or commencement of what the law calls an usurpation. And as to the second step mentioned in the foresaid definition (viz. being admitted and instituted), it must be an admission upon a presentation made; and by consequence not a collation by the bishop; nor the institution of a clerk who pretending himself to be patron of a church that is void prays the ordinary to admit and institute him, and (without a presentation in form) obtains institution. *Gibf. 782.*

Also it is said, that no usurpation in time of war putteth the right patron out of possession, albeit the incumbent come in by institution and induction; and time of war doth not only give privilege to them that be in war, but to all others within the kingdom: and altho' the admission and institution be in time of peace, yet if the presentment were in time of war, it putteth not the right patron out of possession. *1 Inst. 249. Watf. c. 20.*

And the reason of this seemeth to have been, because anciently in the time of war, the courts were shut up; so that the true patron might not have an opportunity to bring his quare impedit within the six months.

Usurpation.

For to compleat an usurpation, the usurper must be in peaceable possession for six months. At the common law, if a stranger had presented his clerk, and he had been admitted and instituted to a church, whereof any subject had been lawful parson; the patron had no other remedy to recover his advowson but a writ of right of advowson, wherein the incumbent was not to be removed: And the reason of this was, 1. To the intent that the incumbent might quietly intend and apply himself to his spiritual charge: And, 2. The law intended, that the bishop that had cure of souls within his diocese, would admit and institute an able man for the discharge of the pastoral duty, and that the bishop would do right to every patron within his diocese. But since the statute of the 13 Ed. 1. *ft. 1. c. 5.* to enable the usurper to plead plenarty against the true patron, so as to debar him absolutely of that turn, it is not enough that the usurper do present duly, and his presentee be admitted instituted and inducted, but also that the church hath been full by the space of six months, and no writ brought to recover the presentation: for within the six months the patron may bring his writ of quare impedit or darrein presentment (as the case requires), and recover his presentment and possession of the advowson; but if neither of these writs be brought within the six months (that is, so as to bear teste within that time) the incumbent is in for life, and the usurpation compleat. *1 Inst. 344. Watf. c. 13.*

And heretofore, if an usurper presented, and his clerk was instituted and inducted, and the true patron did not bring his quare impedit within six months; in some cases he did not only lose his turn for that time, but his presentation was gone for ever. *Watf. c. 7.*

Thus in the case of *Ashby and White, T. 2 An.* it was said by Holt chief justice; that if the purchaser of an advowson in fee simple, before any presentment, suffer an usurpation, and six months to pass without bringing his quare impedit, he hath lost his right to the advowson, because he hath lost his quare impedit, which was his only remedy; for he could not maintain a writ of right of advowson: and tho' he afterwards usurp, and die, and the advowson descend to his heir; yet the heir cannot be remitted, but the advowson is lost for ever without recovery. For where a man hath but one remedy to come at his right, if he loses that, his right is gone. *L. Raym. 954.*

But now by the statute of the 7 An. c. 18. *Forasmuch as the pleading in a quare impedit is found very difficult, whereby many patrons are either defeated of their rights of presentation, or put to great charge and trouble to recover their right; it is therefore enacted, that no usurpation upon any avoidance in any church, vicarage, or other ecclesiastical promotion, shall displace the estate or interest of any person intitled to the advowson or patronage thereof, or turn it to a right; but he that would have had a right if no usurpation had been, may present or maintain his quare impedit upon the next or any other avoidance (if disturbed) notwithstanding such usurpation.*

Usury.

1. **USURY** in a strict sense seemeth to be, a contract upon the loan of ^{What.} money, to give the lender a certain profit for the use of it, upon all events, whether the borrower make any advantage of it, or the lender suffer any prejudice for the want of it, or whether it be repaid on the day appointed or not. *1 Haw. 245.*

And in a larger sense it seemeth, that all undue advantages taken by a lender against a borrower, come under the notion of usury, whether there were any contract in relation thereto or no: as where one in possession of land, made over to him for the security of a certain debt, retains his possession after he hath received all that is due from the profits of the land. *1 Haw. 245.*

2. Use or interest, by the civil law, is divided into lucrative and com- ^{By the civil} pensatory. Lucrative is, when it is paid where there hath been no ad- ^{law.} vantage made by the debtor, and no delay or deceit in him: and this is condemned by the civil law. Compensatory is, when it is given, where the thing lent hath been advantageous to the debtor, and disadvantageous to the creditor that he was not sooner paid: and this is permitted by that law. *Wood Civ. L. 213.*

And by the civil law (Swinburn tells us), a manifest usurer cannot make a testament; and tho' he make one, it is void in law concerning goods and chattels, unless he satisfy for the usury, or put in caution for satisfaction to be made. *Swinb. 101.*

And as manifest usurers are forbidden to make testaments themselves, or to dispose their goods by their last wills; so are they forbidden to reap any benefit by the testament of others, or to be capable of any legacy of goods. *Swinb. 376.*

3. By a constitution of Edmund archbishop of Canterbury; *We forbid* ^{By the canon} *any man to detain a pledge, after he hath received the principal out of the pro-* ^{law.} *fits, after deduction of expences, for this is usury.* *Lind. 160.*

Out of the profits] The pledge in this case must be supposed to be lands, cattle, or such like, out of which a profit ariseth. *Johns.*

And by *Can. 109.* If any offend their brethren by ——— usury; the churchwardens or questmen and sidemen, in their next presentments to their ordinaries, shall faithfully present every such offender, to the intent that he may be punished by the severity of the laws, according to his deserts; and such notorious offenders shall not be admitted to the holy communion, till they be reformed.

And, in general, it is said, that by the ecclesiastical laws, if a man be a manifest usurer, not only his testament is void (as hath been said); but his body, after he is dead, is not to be buried amongst the bodies of other christian men, in any church or churchyard, until there be restitution or caution tendred, according to the value of such goods. *Swin. 102.*

By the common and statute laws.

4. By the laws of king Alfred, it was ordained, that the chattels of usurers should be forfeited to the king, their lands and inheritances should escheat to the lords of the fee, and they should not be buried in the sanctuary. *Swin.* 102. *1 Haw.* 245.

Also it seems to have been the opinion of the makers of divers acts of parliament, since the reformation, that all kinds of usury are contrary to good conscience. *1 Haw.* 245.

By the 5 & 6 *Ed. 6. c. 20.* (now repealed), it was enacted, that no person by any means should lend or forbear any sum of money for any manner of usury or increase to be received or hoped for, above the sum lent.

In the time of queen Elizabeth, when commerce began to extend its influence, a relaxation of the laws against usury followed of course. Thus by the 13 *Eliz. c. 8.* it is enacted, that no person shall take above 10 *per cent.* interest; on pain of being punished and corrected according to the ecclesiastical laws heretofore made against usury.

By the 21 *Jas. c. 17.* None shall take above 8 *per cent.* (with a proviso, that this statute shall not be construed or expounded to allow the practice of usury in point of religion or conscience).

By the 12 *Car. 2. c. 13.* None shall take above 6 *per cent.* (without any proviso).

And by the 12 *An. st. 2. c. 16.* None shall take above 5 *per cent.* on pain of treble value of the money lent; and all contracts to the contrary shall be void. And every scrivener or solicitor, who shall take for brokerage, soliciting, driving, or procuring the loan or forbearing of any sum of money, above the rate of 5s for the loan or forbearing of 100l for a year, or more than 12d above the stamp duties for making or renewing the bond or bill for loan or forbearing thereof, or for any counter-bond or bill concerning the same; shall forfeit 20l, half to the king, and half to him that will sue, with costs; and be imprisoned for half a year.

And therefore in these days a distinction seemeth to be made, betwixt usury and legal interest: for what exceedeth the legal interest is properly usury; and he who exacteth it seemeth still to be punishable as an usurer. *1 Dom.* 126.

And, upon the whole, it seemeth now to be generally agreed, that the taking of reasonable interest for the use of money is in it self lawful, and consequently that a covenant or promise to pay it, in consideration of the forbearance of a debt, will maintain an action. For why should not one who hath an estate in money be as well allowed to make a fair profit of it, as another who hath an estate in land? and what reason can there be, that the lender of money should not as well make an advantage of it as the borrower? Neither do the passages in the mosaical law, which are generally urged against the lawfulness of all usury, if fully considered, so much prove the unlawfulness as the lawfulness of it; for if all usury were against the moral law, why should it not be as much so in respect of foreigners, of whom the jews were expressly allowed to take it, as in respect of those of the same nation, of whom alone they were forbidden to receive it? From whence it seems clearly to follow, that the prohibition

tion of it to that people was merely political, and consequently doth not extend to any other nation. 1 *Haw.* 245. 2 *Burnet.* Reform. 192.

Wakes. See **Church.**

Wales: Distribution of intestates effects there. See **Wills.**

Waste committed in the glebe lands. See **Glebe lands.**

Way thro' the church-yard. See **Church.**

Way to the church. See **Church.**

Weapon drawn in the church or church yard. See **Church.**

Welsh tongue; service in it. See **Publick worship.**

Whitsun-farthings. See **Pentecostals.**

Wills.

THE law affecting *Papists* in particular, with regard to wills and administrations, is treated of under the title **Papery.**

I. Who may make a will.

II. Of what things a will may be made.

III. Form and manner of making a will; and therein of appointing guardians and executors.

IV. Of the probate of wills, and administration of intestates effects.

V. Of the duty of executors and administrators in making an inventory, and getting in the effects of the deceased.

Wills. Who may make.

VI. Of the payment of debts by executors or administrators.

VII. Of the payment of legacies, and distribution of intestates effects.

VIII. Account.

I. Who may make a will.

Difference between will and testament.

1. *Testament* and *will*, strictly speaking, are not synonymous. A *will* is properly limited to land; and a *testament* only to chattels, requiring executors, which a will only for land doth not require. So every testament is a will; but every will is not a testament. *God. Orph. Leg.* 4, 5.

But as authors in treating upon this subject have not adhered to this distinction; so, throughout this title, the words *will* and *testament* are used indiscriminately.

So also, the word *devise* seemeth properly applicable to lands; *bequest, bequeath, give, dispose*, and such like, to goods: yet, forasmuch as authors do generally confound them, and because that propriety of expression is not so much regarded in wills as in other legal instruments of conveyance, so long as the testator's intention doth sufficiently appear; therefore it hath not been thought necessary in these different ways of expression to observe a scrupulous exactness, but to take the words in the several authors as they stand; and this so much the rather, as it seemeth in general to be an unwarrantable liberty, in reciting matters of law from books of acknowledged authority, to presume to vary the expression without necessary or urgent cause.

Infant.

2. It doth not seem to be clearly settled, what shall be the lowest age, at which a person shall be allowed to make a testament of goods and chattels.

Dr Gibson says, when prohibitions have been prayed, on suggestion that the testator was not in one case seventeen, in another case eighteen years of age, which it was said were the lowest ages assigned by the common law for making a testament of goods and chattels; they were denied in both cases for the same reason, namely, that it belongs to the ecclesiastical court to judge when a person is of age to make a will; and if an inferior court had given sentence against their own law, there was no remedy but by appeal. *Gibbs.* 461. *2 Mod.* 315. *T. Jones* 210.

And one reason of limiting the same to the age of seventeen may be, because (as it is agreed on all hands) that is the proper age at which a person is allowed to take upon himself the office of an executor; administration during the minority of an infant executor ceasing at that age.

In the case of *Bishop and Sharp*, *M.* 1704, in the court of chancery, it is said to have been agreed, that a female may make a will at twelve years; and a male at seventeen, or at fifteen if proved to be a person of discretion. *2 Vern.* 469.

Dr *Godolphin* says, an infant male at the age of fourteen years, and female at the age of twelve years, may make a testament of goods and chattels. *God. O. L. 23.*

And in the case of *Hyde and Hyde, H. 8 An.* it is said to have been agreed, that a male infant of fourteen years of age, and a female of twelve years of age, might make a will of a personal estate; and it was said in this case, that it was so agreed by the lord keeper Wright in the case of *Sharpe and Sharpe*, wherein they followed the civil law of Justinian for their consent to marriage at such ages. *Gilb. Rep. 74.*

And it is true, that Justinian fixes the *testamentary* age and the age of *puberty* alike, to wit, in the male at the age of fourteen, and in the female at the age of twelve. But by the common law of England, the age of *discretion* both in the male and female is the age of fourteen; altho' the same common law admits of Justinian's distinction as to the age of *puberty* or consent to marriage.

And by the author of the *Law of Executors*, who is said to have been judge Dodderidge, it seems to be laid down generally, that an infant of the age of discretion, to wit, the age of fourteen years, may make a will of goods and chattels. *Law of Ex. 10.*

And Mr *Wentworth* saith, he thinks that at the age of fourteen, being in the judgment of law the age of discretion, a person may make a testament. *Wentw. 214.*

And here it may be proper to observe, that all the books in general do remark, with some degree of wonder, that Mr *Perkins* saith, an infant of four years of age may make a testament. (*Perk. 210.*) But surely this must have been an error of the press; which might possibly enough happen from a similitude of the words, or especially of the figures 4 and 14.

But by the statute of the 34 & 35 H. 8. c. 5. s. 14. *Wills or testaments made of any manors lands tenements or other hereditaments, by any person within the age of twenty one years, shall not be taken to be good or effectual in law*; for until that time by the common laws of this realm, they are accounted infants. *Swin. 74.*

But by custom in particular places, they may devise lands before the age of twenty one. *God. O. L. 21. Wentw. 214.*

But no custom of any place can be good, to enable a male infant to make any will before he is fourteen years of age. *Law of Exec. 153.*

3. An idiot is justly excluded from making a testament. *Swin. 8.* Idiot.

Now an idiot, or natural fool is he, who notwithstanding he be of lawful age, yet he is so witless, that he cannot number to twenty, nor can tell what age he is of, nor knoweth who is his father or mother, nor is able to answer any such easy question; whereby it may plainly appear, that he hath not reason to discern what is to his profit or damage, nor is apt to be informed or instructed by any other: and such an idiot cannot make any testament, nor may dispose either of his lands or goods. *Swin. 79.*

4. Mad folks and lunatick persons, during the time of their furor or Lunatick. insanity of mind, cannot make a testament, nor dispose any thing by will; and the reason is most forcible, because they know not what they

do : for in making of testaments, the integrity and perfectness of mind and not health of the body is requisite. *Swin. 76.*

Howbeit, if these mad or lunatick persons have clear or calm interpositions, then during the time of such their quietness and freedom of mind, they may make their testaments. *Swin. 76.*

And it is sufficient for the party which pleadeth the insanity of the testator's mind, to prove that the testator was beside himself before the making of the testament, altho' he do not prove the testator's madness at the very time of making the testament: the reason is, it being proved that the testator was once mad, the law presumeth him to continue still in that case, unless the contrary be proved. For like as the law presumeth every man to be an honest man, unless the contrary be proved, and being proved, then he which is evil to be evil still; so concerning furor, the law presumeth every man to have the use of reason and understanding, unless the contrary be proved; which being proved accordingly, then he is presumed in law to continue still void of the use of reason and understanding, unless the testator were besides himself but for a short time, and in some peculiar actions, and not continually for a long space, as for a month or more; or unless the testator fell into some frenzy upon some accidental cause, which cause is afterwards taken away; or unless it be a long time since the testator was assaulted with the malady: for in these cases the testator is not presumed to continue in his former furor or frenzy. *Swin. 78.*

Yet it is a hard and difficult point, to prove a man not to have the use of understanding or reason: and therefore it is not sufficient for the witnesses to depose, that the testator was mad or besides his wits; unless they render or yield a sufficient reason, to prove this their deposition; as that they did see him do such things, or heard him speak such words, as a man having reason would not have done or spoken. *Swin. 78.*

Person of
weak under-
standing.

5. *E. 3 Jac.* in the star chamber, in *Combe's* case it was agreed by the judges, that sane memory for the making of a will is not at all times when the party can speak yea or no, or had life in him, nor when he can answer to any thing with sense; but he ought to have judgment to discern, and to be of perfect memory, otherwise the will is void. *Mo. 759.*

And in the case of the marquis of *Winchester*, *T. 41 Eliz.* it is said, that by the law it is not sufficient that the testator be of memory when he maketh his will, to answer to familiar and usual questions; but he ought to have a disposing memory, so that he be able to make disposition of his estate with understanding and reason: and this is such memory, as the law calls sound and perfect memory. *6 Co. 23.*

But every person is presumed to be of perfect mind and memory, unless the contrary be proved: and therefore if any person go about to impugn or overthrow the testament, by reason of insanity of mind, or want of memory; he must prove that impediment. *Swin. 77.*

But if a man be of a mean understanding, neither of the wise sort nor of the foolish, but indifferent as it were betwixt a wise man and a fool, yea tho' he rather incline to the foolish sort; such an one is not prohibited to make a testament: unless he be yet more foolish, and so very simple and sottish, that he may easily be made to believe things incredible or impossible, and hath not so much wit as a child may have of

of ten or eleven years of age, who is therefore intestable by the law, for want of judgment. *Swin.* 80.

6. He that is overcome with drink, during the time of his drunkenness, is compared to a madman; and therefore if he make his testament at that time, it is void in law. Which is to be understood, when he is so excessively drunk, that he is utterly deprived of the use of reason and understanding: otherwise, if he be not clean spent, albeit his understanding be obscured, and his memory troubled, yet he may make his testament being in that case. *Swin.* 83.

7. By a constitution of archbishop Stratford; *Whereas divers persons do hinder or endeavour to hinder the free making and execution of the testaments of women, either sole or married; we decree, that none shall henceforth do the same, on pain of the greater excommunication.* *Lind.* 173. Married woman.

And *Lindwood*, in his commentary hereupon, contends for the capacity of married women to make a will, in pursuance of this constitution; especially where such woman hath brought a large fortune to her husband, who perhaps had nothing of his own before. *Lind.* 173.

Two years after the making of this constitution, we find a petition of the commons in parliament, that whereas there was a constitution made by the prelates, that women married might make a will, it might be ordained that the people should remain in the same state, as they had been accustomed to be in the times of the king's progenitors: To which it was answered, as to this matter, that the king will that law and reason be done. *Gibf.* 461.

And by the statute of the 34 & 35 H. 8. c. 5. it is enacted, that *wills or testaments made of any manors lands tenements or other hereditaments, by any woman covert, shall not be taken to be good or effectual in the law.* s. 14.

And also of goods and chattels, the wife cannot make her testament without the licence or consent of her husband; because by the laws and customs of this realm, so soon as a man and woman are married, all the goods and chattels personal that the wife had at the time of the spousals or celebration of the marriage or after, and also the chattels real if he overlive his wife, belong to the husband, by reason of the said marriage; and therefore with good reason she cannot give that away which was hers, without the sufferance or grant of the owner. *Swin.* 88, 89.

And albeit the testament be made before the marriage, yet she being intestable at the time of her death, by reason her husband is then living, the testament is void; for it is necessary to the validity of such testament, that the testator have ability to make a testament, not only at the time of making thereof, when the testament receiveth its essence and being; but also at the time of the testator's death, when the testament receiveth its strength and confirmation. *Swin.* 88.

And albeit the wife do overlive the husband, yet the testament made during the marriage is not good; because she was intestable at the time of the will making: but if the testament being made during the coverture, she do approve and confirm the same after the death of her husband; in this case the devise is good, by reason of her new consent, or new declaration of her will; for then it is as it were a new will. *Swin.* 88.

And altho' the will be made before marriage, and the wife survive the husband, yet it seemeth that the will shall not revive upon the husband's death. As in the case of Mrs Lewis, some years ago, before the delegates: Mrs Lewis, a widow, made a will; soon after, she married again; in some time her second husband died, and she again became a widow, without any children by either husband. The will which she made in her first widowhood remained; and being found after her death, the question was, whether it was a good will or not. The counsel for the will cited many authorities from the civil law, and shewed, that among the Romans, if a man had made his will, and was afterwards taken captive, such will revived and became again in force, by the testator's repossessing his liberty. But it was observed on the other hand, that marriage is a voluntary act, but captivity is the effect of compulsion. And the will was adjudged not to be good.—And in the case of *Forse* and *Hemblinge*, *M. 30 & 31 El.* (4 Co. 60, 61.) it was said, that if a man of sane memory make his will, and afterwards become of non-sane memory, this is no countermand of the will, because this is done by the act of god: But marriage is the voluntary act of the party, and amounteth in law to a countermand of the will.

But yet nevertheless, upon licence or consent of the husband, the wife may make her testament even of his goods. *Swin. 89.*

But albeit the husband do give licence to his wife to make a will of his goods; yet he may revoke the same, not only at the making of the will, but after her death, at the least (*Swinburne* says) before the will be proved. *Swin. 89.*

Yet such his consent (*Dr Gibson* says) shall be implied, until the contrary do appear; and if after her death he doth consent, he can never afterwards dissent; and if immediately upon the death of the wife, he discourses and deals with the executor whom she hath appointed, as executor, as in recommending to him a painter for escutcheons, a goldsmith for rings, or the like, this is a good assent, and makes it a good will; and tho' after such assent given, he do upon sight of the will dislike it, and oppose the probate, or enter a caveat, such disagreement shall not hurt the will; and when there is an express agreement or consent that a wife may make a will, a little proof will be sufficient to make out the continuance of that consent after her death; but it is necessary to prove a *disagreement* made, in a solemn and formal manner, in express words, and not by implication. *Gibf. 461, 2.*

But when such a will was brought to the prerogative court to be proved, and a prohibition was prayed for the husband upon this suggestion, that the testatrix was a feme covert, and so, disabled by the law to make a will, it was granted; because tho' the husband may by covenant depart from his right, and suffer his wife to make a will, yet whether he hath done so or not, shall be determined by the common law. *Gibf. 462.*

If a woman have a lease, an estate by extent, the next avoidance of a church, or other chattel real; these are not devested out of her into her husband by marriage, but in case she overlive him, they continue to her as before, no alienation or alteration having been made by the husband, who

who had power to dispose of them by gift in his life time, tho' not by his will: yet such a woman in her husband's life time cannot of or for these things, without her husband's assent, make an executor or will; but she dying before him, they would by the operation of law accrue to him. *Went.* 198. *Law of Test.* 33.

Another kind of goods, or rather interests, a woman may have, to wit, debts or things in action; which, as the former, are not devested out of her by marriage into her husband, nor yet can she thereof make an executor without her husband's assent, altho' they be one degree farther from the husband than the said chattels real; for that tho' the husband do overlive the wife, he shall not be intitled to them, as to the former. But if the wife makes him executor of these, as she may; or if after her death, he takes out administration of her goods, then he is thereby intitled to them. *Went.* 199. *Law of Test.* 33, 34.

But it is said, that if a woman hath pin-money or a separate maintenance settled on her, and she by management or good housewifry saves money out of it, she may dispose of such money so saved by her, or of any jewels bought with it, by writing in nature of a will, if she die before her husband, and shall have it her self if she survive him, and the same shall not be liable to the husband's debts. *Swin. a.* 95. *Viner.* Baron and Feme. R. a. 16.

And altho' a feme covert is so entirely under the power of her husband, that she cannot make what in propriety of speech is a will; yet she may make what is called an *appointment*. And the usual way is, for the intended husband to enter into a bond before marriage, in a penal sum, conditioned to permit his wife to make a will, and to dispose of money or legacies to such a value, and to pay what she shall appoint, not exceeding such a value; and in such case, if after the marriage, and during the coverture, she makes any writing purporting her will, and disposes legacies to the value agreed on, tho' in strictness of law she cannot make a will without her husband; yet this is a good *appointment*, and the husband is bound by his bond to perform what is appointed. *Swin. a.* 94. *1 Vern.* 244.

And in *1 Mod.* 211. it is said, that the husband may bind himself by covenant or bond, to permit his wife by will to dispose of legacies, and this will be such an appointment as the husband will be bound to perform; yet it doth not operate as a will, neither ought it to be proved in the spiritual court; for the property passeth from him to her legatee, and it is his gift:

And therefore if the legatee dieth before the wife, such legacy is not lapsed; for this in strictness is only the execution of a trust, and the executor or administrator of such legatee shall be intitled.

And if in the case where a feme covert cannot make a testament without the husband's licence, the husband grants a licence to the wife to make a testament of a certain portion of his goods, and the wife so licensed doth make one testament, and afterwards another, and perhaps a third or fourth; the licence shall be understood of the last testament, and not of the first. *Law of Test.* 37.

But

Wills. Who may make.

But if a feme covert is executrix to some other person, and in that right hath divers goods and chattels; these are not devested out of her, because she hath them not merely to her own use, but as representing the person of another: and therefore in this case (Swinburne says) the wife may, for the continuation of the executorship, make an executor, and consequently a testament, without the consent or assent of her husband. *Swin. 89. Law of Test. 34.*

But this rule, that a feme covert executrix may make her will of those goods whereof she is executrix, is restrained in two cases:

The first is, where she doth not make an executor, but bequeaths the goods whereof she is executrix, by devise or legacy; in this case the will is void, because an executor may not dispose of the goods of the testator otherwise than to the use of the testator, to the payment of his debts and performance of his will, and therefore may not give or devise the same by legacy, for that were to dispose of the testator's goods as if they were the proper goods of the executor, and to convert the same to the private use of the legatee, and not to the use of the testator. But when an executor doth only make another executor, the second executor doth stand chargeable and accountable for the distribution of the first testator's goods to the use of the same testator as did the former executor, and is not by the laws of the land reputed for the executor of the executor, but of the former testator, and so is not a legatee. *Law of Test. 35, 36. Swin. 90.*

The second is, where she is not only executrix, but legatee also, and hath accepted of the thing bequeathed not as executrix, but as legatee; and in this case the will of the feme covert is also void. For she taking the thing bequeathed not as executrix, but as legatee, doth thereby make it her own proper goods, and consequently her husband's; and therefore cannot be given from him, without his licence or consent. If it doth not appear whether the wife took the thing bequeathed as executrix, or legatee; it shall be presumed, she took it as executrix. *Swin. 90. Law of Test. 36.*

And altho' a feme covert being executrix may make her testament, and appoint an executor of those goods which she hath as executrix, and not as legatee, without her husband's assent; yet the profit and fruit which arise out of those goods which she hath as executrix during the marriage, as calves, lambs, and such like profit of kine, sheep, and cattle, do belong to the husband, and not to her self as executrix; and therefore she cannot make her testament of such fruits and profit, without her husband's approbation. *Swin. 90. Law of Test. 36.*

H. 4 G. 2. King and Bettefworth. Mandamus to grant administration to *John Cullem*, of *Joan* his wife. Return; that by articles before marriage it was agreed, that the wife should have power to make a will, and dispose of her leasehold estate; that pursuant to this power, she made a will, and her mother executrix, who has duly proved the same. To this return it was objected, that she might have things in action not covered by the deed, and the husband was in all events intitled to an administration as to them. On the other hand, it was insisted, that with the con-

ent of the husband she might make a will; and here is his consent by being party to the deed. But by the court; A general consent to make a will doth not seem sufficient, but there should be a consent to that particular will: besides, this is going beyond her power, which did not extend to the making an executor. This is rather an appointment, which in equity will controll the administration as to the leasehold estate, than a will. And as there may be other effects not covered by the deed, the return is ill, and there must be a peremptory mandamus. *Str.* 891.

8. That testament is to be repelled, which is made upon just fear, that is, such a fear as may move a constant man; as the fear of death, or of bodily hurt, or of imprisonment, or of the loss of all or most part of one's goods, or the like. Whereof no certain rule can be delivered, but it is left to the discretion of the judge, who ought not only to consider the quality of the threatnings, but also the persons as well threatening, as threatened; in the threatening, his power and disposition; in the person threatened, the sex, age, courage, pusillanimity, and the like. But if the testator afterwards, when there is no cause of fear, do ratify and confirm the testament, it seemeth to be good in law. *Swin.* 475, 476.

If a man makes a will in his sickness, at the over importunity of his wife, to the end he may be quiet; this shall be said to be a will made by restraint, and shall not be good. *Styl.* 427.

But if the person who makes the motion be not any ways suspected, and it also appears by some conjectures that the sick person had a desire to make his will; in this case the testament is good. *Law of Test.* 53.

9. *T.* 1725. *Stephenson and Gardiner.* A bill was brought to set aside a will relating to a personal estate only, and to stay the probate thereof, setting forth that the will was gained by fraud, and by misrepresenting the plaintiffs, who were the half brothers and sisters of the testatrix; and alleging, that the will was falsely read to her; and setting forth divers instances of fraud, on the part of the defendants, in procuring this will. The defendants, as to that part of the bill which ought to set aside the will, and to stay the proceeding, demurred to the jurisdiction of the court; forasmuch as upon the face of the bill it appeared, that the plaintiffs were improper to sue here, in regard the spiritual court had the proper cognizance of wills relating to personal estates, and could determine fraud concerning them. After which, motions were made before the lords commissioners and the lord chancellor King for an injunction. But the court was against it: for the spiritual court hath jurisdiction of fraud relating to a will of a personal estate, and can examine the parties by allegation touching this fraud; and if the will was falsely read to the testatrix, then it is not her will. *2 P. Will.* 286.

T. 1686. *Archer and Mosse.* The testator, when in perfect health, had made his will, and thereby gave to the plaintiff *Archer* his nephew the greatest part of his personal estate, to the value of 5000*l.* But one *Bridget Sandymon*, his maid servant, had in his sickness prevailed upon him to make another will, and to marry her a week before his death, when he lay in his sick bed, at six of the clock at night, tho' it was really proved by two ministers, that she was a year before actually married to the defendant

fendant *Moffe*, and was then his wife, and that *Moffe* procured the licence for the marriage of the testator to *Bridget*; and this will being set up by *Moffe* (executor to *Bridget*), tho' it appeared that there was as gross a practice as could be in the gaining the will (the testator being non compos mentis both at the time of making the will, and also at the time of the supposed marriage, and that in his health he knew that *Moffe* and *Bridget* were married), and that *Bridget* suppressed the first will; yet that will so set up, being proved in the prerogative court, and the matter in question relating only to a personal estate, the lord chancellor was of opinion, that whilst that probate stood, the matter was not examinable in chancery; and tho' the fraud was fully proved and opened to him, he would not hear any proofs read, but dismissed the bill. 2 Vern. 8.

But tho' a will gained by fraud, and proved in the spiritual court, is not to be controverted in equity; yet if the party claiming under such a will comes for equity in the court of chancery, he shall not have it. 2 Vern. 76.

M. 1715. Goffe and Tracy. It being urged, that a will concerning land is only triable at common law, and that the party there may take advantage of any fraud or imposition on the testator, and therefore not proper to be examined into or set aside in equity upon pretence of fraud or surprize; the lord chancellor held, that there might be fraud in obtaining a will that might be relievable in equity, and of which no advantage could be taken at law; as if a man agree to give the testator 2000 l. in bank bills, if he will devise his estate to him, and on the delivery of such bills makes his will, and deviseth his estate unto him, and the bills prove to be forged or counterfeited. 2 Vern. 700.

But in the case of *Bransby and Kerridge*, July 28, 1728; in the house of lords, it was decreed, that a will of a real estate could not be set aside in a court of equity for fraud or imposition, but must be tried at law on *Deviseavit vel non*, being a matter proper for a jury to inquire into. *Law of Test.* 60. *Vin. Devise.* Z. 2.

Person deaf
and dumb.

10. Those who are deaf and dumb by nature, cannot make any kind of testament or last will; unless it do appear by sufficient arguments, that such person understandeth what a testament meaneth, and that he hath a desire to make a testament: for if he have such understanding and desire, then he may by signs and tokens declare his testament. *Swin.* 95.

Blind.

11. Dr Ayliffe says, generally, that persons who are blind cannot make their wills. *Ayl. Par.* 531.

But Dr Swinburne says, he that is blind may make a nuncupative testament, by declaring his will before a sufficient number of witnesses. And he may make his testament in writing, provided the same be read before witnesses, and in their presence acknowledged by the testator for his last will. But if a writing were delivered to the testator, and he not hearing the same read, acknowledged the same for his will, this would not be sufficient; for it may be that if he should hear the same read, he would not acknowledge the same for his will. *Swin.* 96.

And it seemeth best, that it be read over to the testator, and approved by him, in the presence of all the subscribing witnesses; and this the civil

civil law did expressly require in the case of a blind man's will: But in England this strictness seemeth not to be precisely requisite, if there shall be otherwise satisfactory proof before the court that the identical will was read over to him, altho' it was not in their presence: And sometimes the single oath of the writer hath been allowed sufficient by the court of delegates, to prove the identity of the will.

And what precautions are necessary for authenticating a blind man's will, seem in like degree requisite in the case of a person who cannot read. For tho' the law in other cases may presume, that the person who executes a will knows and approves of the contents thereof; yet that presumption ceaseth, where by defect of education he cannot read, or by sickness he is incapacitated to read the will at that time.

12. Whosoever is lawfully convicted of high treason, by verdict, confession, outlawry, or presentment; besides the loss of his life, shall forfeit to the king all his goods and chattels, and all such lands tenements and hereditaments as he shall have in his own right, use, or possession, of any estate or inheritance, at the time of such treason committed, or at any time after; and so consequently is intestable, Inasmuch that traitors are not only deprived of making any testament, or other kind of last will, from the time of their conviction; but also the testament before made doth by reason of the same conviction become void, both in respect of goods, and also in respect of lands tenements and hereditaments. *Swin. 97.*

But if any person, being attainted of treason, obtain the king's pardon, and be thereby restored to his former estate; then may he make his testament, as if he had not been convicted: or if he make any before his conviction and condemnation, the same by reason of such pardon recovereth its former force and effect. *Swin. 97.*

But if a traitor hath goods as executor to another, the same are not forfeited: whence it follows, that of such goods he may make his will. *Swin. 97.*

13. If any person be condemned of felony, he ought to suffer death, and the king shall have all his goods, wheresoever they be found. And if he have any freehold, it shall forthwith be seized into the king's hands, and he shall have the profit thereof by the space of a year and a day, and also waste; and after the king hath had the year, day, and waste, the land shall be restored to the chief lord of the fee. Felons therefore lawfully convicted, cannot make any testaments, or other dispositions, of any goods or lands; because the law hath disposed thereof already. *Swin. 98.*

But if a person be indicted of felony, and on his arraignment will not answer, but standeth mute, whereupon he is to receive the pain *forte et dure*, and be pressed to death; in this case, his goods only are confiscate, but not his lands: and therefore in this case it seemeth he may make his testament of his lands. *Swin. 98.*

But a pardon restoreth him to his former estate. *Swin. 98.*

Felo de se.

14. If a man do willingly kill himself, his testament (if he made any) is void, both concerning the appointment of the executor, and also concerning the legacy or bequest of any goods; for they are confiscate. *Swin.* 106.

But if the testament be of lands, it seemeth it is not void; because a felo de se doth not forfeit any lands of inheritance, for no man can forfeit his lands without an attainder by course of law. *3 Inst.* 55.

Outlaw.

15. An outlawed person is not only out of the king's protection, and out of the aid of law, but also all his goods and chattels are forfeited to the king by means of the outlawry, altho' he were outlawed but in an action personal; and altho' the action were not just, nevertheless his goods and chattels are forfeited, by reason of his contempt in not appearing; and therefore he that is outlawed cannot make his testament of his goods so forfeited. *Swin.* 107.

Howbeit it seemeth, that he who is outlawed in an action personal, may make his testament of his lands; for they are not forfeited. *Swin.* 107.

Also a man outlawed in a personal action may in some case make executors; for he may have debts upon contract which are not forfeited to the king: and those executors may have a writ of error to reverse the outlawry. *Cro. El.* 851.

Excommuni-
cate.

16. It seemeth to be the better opinion, that an excommunicate person may make a testament; unless he be excommunicate with that great curse, which is called anathema, which is not to be inflicted but upon great cause, with great deliberation and solemnity. *Swin.* 109.

And in this case (of the greater excommunication, as it seemeth) lord Coke observes, that an excommunication is a greater disability than an outlawry; for if a plaintiff, who is an executor, be outlawed, his outlawry cannot be pleaded to disable him from proceeding in the suit, because it is in the right of another; but if he is excommunicate it is otherwise, because every man that converseth with such a person is excommunicated himself. *1 Inst.* 134. That is, after he is denounced excommunicate, and they are admonished not to converse with him. *Ayl. Par.* 266.

II. Of what things a will may be made.

Lands.

1. Lord Coke says, at the common law (by which he must be understood to signify the common law since the conquest) no lands or tenements were devisable, by any last will and testament, nor ought to be transferred from one to another, but by solemn livery of seisin, matter of record, or sufficient writing; but by certain customs in some boroughs they were devisable. *1 Inst.* 111.

But altho' lands might not be disposed by will, yet a device was found out, and a distinction made between the land and the use and profits of the land, whereby feoffments to uses came in practice; by virtue whereof a person

a person might dispose of the profits, tho' he could not dispose of the land it self. *Wright's Tenures.* 172.

And the way was this: They conveyed their full estates of their lands to friends in trust, properly called feoffees in trust; and then they would by their wills declare, how their friends should dispose of their lands; and if those friends would not perform it, the court of chancery was to compel them by reason of trust; and this trust was called the use of the land, so as the feoffees had the land, and the party himself had the use; which use was in equity to take the profits for himself, and that the feoffees should make such an estate as he should appoint them; and if he appointed none, then the use should go to the heir, as the estate it self of the land should have done; for the use was to the estate, like a shadow following the body. *Lord Bacon's Use of the Law.* 152.

But by this course of putting lands into use, there were many inconveniences; as, namely, a man that had cause to sue for his land, knew not against whom to bring his action, nor who was owner of it; the wife was defrauded of her thirds; the husband of being tenant by curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; the tenant of his lease: for these rights and duties by the law were due from him that was owner of the land and none other, which was now the feoffee of trust; and so the old owner, which we call the feoffor, should take the profits, and leave the power to dispose of the land at his discretion to the feoffee; and yet he was not such a tenant as to be seised of the land, so as his wife could have dower, or the lands be extended for his debts, or that he could forfeit it for felony or treason, or that his heir could be ward for it, or any duty of tenure fall to the lord by his death, or that he could make any leases of it. *Bac.* 153.

Which frauds, by degrees of time as they increased, were remedied by divers statutes; as namely, by a statute of the 1 H. 6. and by another of the 4 H. 8. it was appointed, that the action may be tried against him which taketh the profits, which was the *cestuy que use*; by a statute made in the 1 R. 3. leases and estates made by *cestuy que use* are made good, and estates by him acknowledged; by a statute in the 4 H. 7. the heir of *cestuy que use* was to be in ward; and by a statute in the 16 H. 8. the lord was to have relief upon the death of any *cestuy que use*. *Bac.* 153.

Which frauds nevertheless multiplying daily, in the end in the 27th year of king Hen. 8. the parliament purposing to take away all those uses, and to reduce the law to the ancient form of conveying of lands by publick livery of seisin, fine and recovery, did ordain, that where lands were put in trust or use, there the possession and estate should be presently carried out of the friends in trust, and settled and invested on him that had the uses, for such term and time as he had the use. *Bac.* 153, 154.

And by this statute of the 27 H. 8. the power of disposing land by will, is clearly taken away amongst those frauds: whereupon in the 32 H. 8. another statute was made, by which it is enacted, that every person having any manors lands tenements or hereditaments, holden in socage or of the nature of socage tenure, shall have full and free liberty power and authority, to give dispose will and devise, as well by his last will and testament

in writing, as otherwise by any act or acts lawfully executed in his life, all his said manors lands tenements or hereditaments, or any of them, at his free will and pleasure.

And in the same statute there are several restrictions and limitations with regard to the devising of lands holden by knight's service; which were further explained by the statute of the 34 & 35 H. 8. c. 5.

And finally, by the statute of the 12 C. 2. c. 25. tenures by knight's service were abolished, and all tenures turned into free and common socage.

Lands to charitable uses.

2. By the 9 G. 2. c. 36. *No manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever; nor any sum or sums of money, goods, chattels, stocks in the publick funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands tenements or hereditaments, shall be given or appointed by will, to any person or persons, bodies politick or corporate, or otherwise, for any estate or interest whatsoever, in trust, or for the benefit of, any charitable uses: but the same shall be done by deed indented, twelve months at least before the death of the donor, to be inrolled within six months after the execution in the high court of chancery; and the same to take effect immediately after the execution for the charitable use intended.*

Estate pur auter vie.

3. By the statute of the 29 C. 2. c. 3. *Any estate pur auter vie shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the deviser by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.* f. 12.

Pur auter vie] That is, being held by lease during the life of another person.

Special occupant] A special occupant is, where an estate for life is made to a man and his heirs; in such case, the heir shall have the estate, after the decease of his ancestor, as *special occupant*, or as a person particularly described, to whom the estate shall go after the lessee's death.

Mortgage.

4. One that hath money to be paid to him on a mortgage, may devise this money when it comes. *God. O. L. 391.*

And if the feoffee in mortgage, before the day of payment which should be made to him, maketh his executors and die, and his heir entred into the land as he ought; it seemeth in this case, that the feoffor ought to pay the money at the day appointed to the executors, and not to the heir of the feoffee: but yet the words of the condition may be such, as the payment shall be made to the heir; as if the condition were, that if the feoffor pay to the feoffee or to his heirs such a sum at such a day, there after the death of the feoffee, if he dieth before the day limited,

mitted, the payment ought to be made to the heir at the day appointed.

1 *Inst.* 209, 210.

And hereby it appeareth, that the executors do more represent the person of the testator, than the heir doth that of the ancestor; for tho' the executor be not named, yet the law appoints him to receive the money, but so doth not the law appoint the heir to receive the money unless he be named. 1 *Inst.* 209, 210.

5. A person may devise by his will the right of presenting to the next Advowson. avoidance, or the inheritance of an advowson. And if such devise be made by the incumbent of the church, the inheritance of the advowson being in him, it is good, tho' he die incumbent; for tho' the testament hath no effect but by the death of the testator, yet it hath an inception in his life time: and so it is, tho' he appoint by his will who shall be presented by the executors, or that one executor shall present the other, or doth devise that his executors shall grant the advowson to such a man. *Watf. c.* 10.

6. If upon articles for a purchase, the purchaser die, having devised Lands contracted for, the land before a conveyance executed, the land will pass in equity; for the testator had an equity to recover the land, and the vendor stood trustee for the testator, and as he should appoint, till a conveyance executed. 1 *Chan. Cas.* 39. 2 *Vern.* 679.

7. If a man have a lease for never so many years, determinable upon Lease. life or lives, that is, if such or such live so long; this estate may well enough be given and disposed by will, because it is but a chattel. *Went.* 19.

8. Mr Wentworth says, If one having a lease for many years, as an Term for hundred, five hundred, more or less, doth devise and bequeath the same years. to A and the heirs male of his body, and for want of such issue to B and the heirs male of his body; and A dieth, having issue a son; the term shall not go to his son, but to his executor or administrator: for it cannot be made a matter of inheritance. So if A had died without issue male, the term should not have gone or remained to B, but to the executor or administrator of A. *Went.* 54.

So of an advowson, or any other hereditament, granted or devised to one and his heirs for a hundred years; or if such a termor grant a rent out of the land to A and his heirs, or to the heirs, or heirs male of his body: yet shall the same go to the executor, and not to any heir; for it being derived out of a chattel, cannot be any freehold or inheritance, but is it self a mere chattel. *Went.* 54.

9. Albeit by deed of gift made in the life time of any person to another of all his goods and chattels, debts or things in action do not pass; yet if the testator by his last will and testament, do give or bequeath to another any debt due unto him, or a thing in action belonging unto him, the legacy is good and effectual in the law, and may be recovered in this manner, that is to say, if the testator do make the legatary executor of that particular debt or thing in action bequeathed, then the legatary as executor thereof may commence suit in his own name, and recover the same to his own use, against him by whom it was due; but if the

Debts or things in action.

the testator do not make the legatary executor of the debt or thing in action bequeathed, then his remedy lieth in the ecclesiastical court, where he may convent the executor, and compel him either to sue for that debt in a court competent, and upon recovery and payment thereof to pay it over to the legatary, or else to make a letter of attorney to the legatary for the recovery of the debt or thing in action bequeathed in the name of the executor to the use of the legatary. *Swin.* 187, 188.

Things which
the testator
hath not of
his own.

10. Albeit the testator have no such thing of his own as is bequeathed, yet nevertheless the legacy is good in law; therefore if the testator do bequeath a horse or a yoke of oxen, the legacy is good in law, tho' the testator have neither horse nor ox of his own. But who shall make choice, in this case, of the thing so bequeathed, is a question not to be neglected: and the solution is this; that if the words of the devise be directed to the legatary, as if the testator shall thus say, I will that *AB* shall have a horse, the choice doth belong to the legatary; but if the words be directed to the executor, as if the testator shall thus say, I will that my executor give to *AB* a horse, the election doth belong to the executor. Provided nevertheless, that to whomsoever the election doth belong, whether to the legatary, or to the executor, they must not be unreasonable in their election, but frame themselves according to the meaning of the testator; otherwise the legatary might make choice of the best horse in the country, and the executor of the worst, contrary to the meaning of the deceased. *Swin.* 188.

Things in
joint tenancy.

11. If there be two jointenants of *lands*, and one of them deviseth that which to him belongs, and dieth; this is no good devise, and the devisee takes nothing, because the devise doth not take effect until after the death of the devisor, and then the surviving jointenant takes the whole by prior title, to wit, from the first feoffment. *Gilbert on Wills.* 120.

So also a man cannot give or bequeath by will, any of those goods or chattels which he hath jointly with another: for if he should bequeath his portion thereof to a third person, this bequest is void by the laws of this realm; and the survivor, which had those goods or chattels jointly with another, shall have that portion so bequeathed, notwithstanding the said will. *Swin.* 189.

But otherwise it is with tenants in common. *God. O. L.* 131.

Corn growing.

12. By the 20 H. 3. c. 2. *Widows may bequeath the crop of their ground, as well of their dowers, as of other their lands and tenements; saving to the lords of the fee all such services as be due for their dowers and other tenements.* And this is only in affirmance of the common law. 2 *Inst.* 80. But by the 27 H. 8. c. 10. *A married woman having a jointure made, shall not have any dowry of the residue of her husband's lands.*

By the 28 H. 8. c. 11. *If the incumbent before his death hath caused any of his glebe lands to be manured and sown, at his proper costs and charges, with any corn or grain; he may make and declare his testament of all the profit of the corn growing upon the said glebe land so manured and sown.* 1. 6.

But if the testator is lessee for years, and sow the land a short time before his lease expires, and then dies, before the corn can possibly be ripe within the term; in this case a devise thereof is void, because he himself could not have reaped it after the expiration of the term, if he had lived.

Swin. 191.

13. Not only that thing may be devised or bequeathed by the testator, Things not which is truly extant, or hath an apparent being at the time of the making yet in rerum natura. of the will or death of the testator; but that thing also which is not in rerum natura, whilst the testator liveth: therefore it is lawful for the testator to bequeath the corn which shall be sown or grow in such a soil after his death, or the lambs which shall come of his flock of sheep the next year, depasturing in such a field. But if there be no such corn growing in that soil, nor any lambs arising out of that flock, then the legacy is destitute of effect, because no such thing is extant at all, as was bequeathed. But if the testator devise a certain quantity of grain or number of lambs, as for the purpose, twenty quarters of corn or twenty lambs, and doth will and devise, that the same shall be paid out of the corn which shall grow in such a field, or arise out of his sheep depasturing in such a ground; tho' not so much or no corn at all there grow, or not any or not so many lambs there arise, yet nevertheless the executor is compellable by law to pay the whole legacies intirely; because the mention of the soil and of the flock, was rather by way of demonstration than by way of condition, rather shewing how or by what means the said legacy might be paid than whether it should be paid at all yea or no. *Swin.* 186.

14. Those things which after the death of the testator descend to the heir of the deceased, and not to his executor, cannot be devised by testament, except in such cases wherein it is lawful to devise the lands tene- Things be- longing to the freehold. ments or hereditaments. And therefore, if a man seised of land in fee or fee tail, bequeath his trees growing upon the said land at the time of his death; this devise is not good, except as before: but if he devise the corn growing upon the same land at the time of his death, from the heir to some other person, this devise is good, albeit the land whereupon it groweth be not deviseable. And the reason of the difference is, because the trees are parcel of the freehold, and descend together with the land to the heir, and not to the executor: but it is not so of corn; for the same shall go to the executor as parcel of the testator's goods. And therefore if a man be seised of lands in the right of his wife, and sow the land, and devise the corn growing upon the same land, and die before the corn be reaped; in this case the legatary shall have the corn, and not the wife: But it is otherwise of grass, and herbs not separated from the ground, at the time of the death of the testator. If a man seised in fee in right of his wife, do let the same lands for years to a stranger, and the lessee soweth the ground, and afterwards the wife dieth, the corn not being ripe; in this case the lessee may devise the same corn, notwithstanding his estate be determined. So also of tenant by curtesy, and tenant in dower. *Swin.* 190.

And

And forasmuch as those things which after the death of the testator descend to the heir and not to his executor, are not devisable by will, except in such cases where lands tenements and hereditaments be devisable; therefore those things which are affixed unto the freehold, are no more devisable than the freehold it self, as the windows, doors, wainscot, and such like. *Swin. 191. 4 Co. 64.*

So if a man be seised of a house, and possessed of divers *heir-looms*, that by custom have gone with the house from heir to heir, and by his will deviseth away these heir-looms; this devise is void: for the will taketh effect after his death; and by his death, the heir-looms by ancient custom are vested in the heir, and the law prefers the custom before the devise. And so it is, if the lord ought to have a heriot against his tenant, and the tenant deviseth away all his goods; yet the lord shall have his heriot for the reason aforesaid. *1 Inst. 185.*

Things in
executorship.

15. The testator may devise all goods and chattels which he hath in his own right, but not those which he hath in the right of another as executor. *Swin. 185.*

Things in ad-
ministration.

16. An administrator cannot make a testament of those goods which he hath as administrator to any person dying intestate; because he hath not any such goods to his own proper use, but ought therewithal to pay the debts of the dead person, and to distribute the rest according to law. *Swin. 189.*

Wife's goods
by the hus-
band.

17. The husband cannot devise such goods as his wife hath as being executrix to another, nor such things as are in action, as debts due to her before marriage by obligation or contract, unless he and his wife recover the same during marriage, or that he renew the bonds and take them in his own name; otherwise after his death they remain to her. *1 Inst. 351.*

But the husband may, at any time during the coverture, release a bond given to his wife. And where the husband makes a *settlement*; the bonds to his wife, being part of her fortune, will notwithstanding his death in the life time of his wife, before the security be changed, be decreed in equity to his executor; he being considered in that case as a purchaser for a valuable consideration. *Cases in the time of L. Talb. 168.*

Things ob-
tained after
the will made.

18. A man may by his will dispose of his chattels and personal estate that he shall for the future acquire, any time after the making his will, to the time of his death. And this is necessary from the reason of the thing; because the chattels and personal estate are in a continual fluctuation; and if the law were not so, it would create very great confusion, or else would render it necessary for a man to make a new will every day. *Gilb. 122.*

But it is not so with lands, for they are fixed and permanent: and therefore if a man maketh his will, and deviseth therein all the lands which he shall have at the time of his death; and after that, he purchaseth lands, and dieth without republication or making a new will; in this case, tho' his intent to the contrary is very apparent, yet it is a void devise: for a man cannot devise any lands but what he hath at the time of making his will. And this was adjudged upon great deliberation, by Holt chief justice and the court, in the case of *Bunker and Cook*:
and

and the judgment was affirmed afterwards upon a writ of error in the house of lords, Feb. 24. 1707. *Gilb.* 122.

But, by Holt chief justice: If he republifheth his will, in fuch manner, and with fuch circumftances, as are neceffary to compleat execution of an original will; then the purchafed lands will pafs as by an original will. 11 *Mod.* 127. And in truth this feemeth to make it a new will, to all intents and purpofes; and not a republication of the old one.

But a codicil, which concerneth only perfonal legacies, will not amount to a republication of the will, fo as to pafs lands purchafed after the making of the will. 2 *Vern.* 625.

If a man deviseth all his lands *for payment of his debts*, and purchafeth lands afterwards; the lord keeper faid he would decree a fale, tho' there were no precedent articles. 2 *Cha. Ca.* 144.

If a man hath a *leafe*, and difpofeth of it by his will; and after furrenders it and takes a new leafe, and after dies; the devisee fhall not have this laft leafe, becaufe this was a plain countermand of his will. *Goldf.* 93.

If a man deviseth a *term for years*, which he hath not at the time of the devife, but purchafeth fome time before his death; Holt chief juftice doubted, whether this would be good. But Mr. Peere Williams fays, that notwithstanding the doubt which the court of king's bench feems to have been in that cafe, it has been clearly held to pafs by fuch will. 3 *P. Will.* 169.

III. Form and manner of making a will; and therein of appointing guardians and executors.

1. By the 29 C. 2. c. 3. intituled, An act for prevention of frauds and Of 1.nds. perjuries, *All devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his exprefs directions, and shall be attested and subscribed in the presence of the faid devifor, by three or four credible witneffes; or elfe they fhall be utterly void, and of none effect.* 1. 5.

Signed] Signing being only mentioned, therefore *fealing* is not neceffary, altho' it be expedient to a testament; which is not properly and legally a deed, to which a feal is effential, tho' it hath the force and virtue of a deed. *God. O. L.* 6. *Wentw.* 29.

Signed by the party so devising the same] *E.* 33 C. 2. *Lemain and Stanley.* The testator made his will, and wrote it with his own hand, and began it thus, I *John Stanley* make this my laft will and testament; but did not fubfcribe his name: yet this was adjudged a good will, and fufficient figning by the testator within the ftatute, to pafs lands; it being fubfcribed by three witneffes in the prefence of the testator; for his name being written in the will, it muft be a fufficient figning within the ftatute fince the ftatute hath not appropriated any particular place in the will,

either top, bottom, or margin, for that purpose; and therefore necessarily the testator is at liberty to put it where he pleases. 3 Lev. 1.

And if the deviser only put his seal to the will, without signing it; this seemeth to be a sufficient signing within the statute: because signing is no more than a mark to distinguish a man's act, and sealing is a sufficient mark to know it to be his will. Gilb. 93.

E. 13 G. Warneford and Warneford. On an issue directed out of chancery, whether there was a devise or not; Raymond chief justice ruled, that sealing a will is a signing within the statute. Str. 764.

H. 1728. Dormer and Thurland. The will was not signed by the testator in the presence of the witnesses; but he acknowledged it to be his hand, and declared it to be his will, in their presence; and they subscribed their names in his presence. Lord chancellor King inclined that the will was good; but ordered the point to be reserved and made a case of for further consideration. 2 P. Will. 506.

And in the case of *Stonehouse and Evelyn, E. 1734*: A will was held to be good, tho' all the witnesses did not see the testator sign it, but he owned it before them to be his hand. And the reporter says, that on his mentioning this case to Mr justice Fortescue Aland, he said that this was the common practice; and that it is sufficient, if one of the three subscribing witnesses swears that the testator acknowledged the signing to be his own hand writing: And it is remarkable, that the statute of frauds doth not say the testator shall sign his will in the presence of three witnesses, but requires these three things; first, that the will should be in writing; secondly, that it should be signed by the testator; and thirdly, that it should be subscribed by three witnesses in the presence of the testator. 3 P. Will. 254.

Attested and subscribed in the presence of the said deviser] It hath been ruled in equity, that a will of lands, attested by three witnesses, who subscribed their names at the request of the testator, tho' at several times, is a good will, tho' the witnesses were never once present together. Gilb. 92. Vin. Devise. N. 10. 12.

In the presence of the said deviser] *E. 3 Ja. 2. Shires and Glascock.* The question was, Whether the will was made according to the statute; for the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which there was a window broken, thro' which the testator might see them. By the court; The statute requireth attesting in his presence, to prevent obtruding another will in the place of the true one: it is enough if the testator might see, it is not necessary that he should actually see them signing; for at that rate if a man should but turn his back or look off, it would vitiate the will. Here the signing was in the view of the testator, he might have seen it, and that is enough. So if the testator being sick, should be in bed, and the curtain drawn. 2 Salk. 688.

But if the witnesses subscribe their names to the will, in a room adjoining to that where the testator lay, but out of his sight, so as he could not see

see them subscribe their names; this is no good will within the statute to pass lands, because the witnesses in that case did not subscribe their names in the testator's presence. *Gilb. 93.*

But it is not necessary *that it appear upon the face of the will* to have been signed in the presence of the devisor: As in the case of *Hands and James, E. 9 G. 2.* In ejectment brought by the plaintiff as heir at law, the question was on a case by consent left to the opinion of the court, whether it shall be left to a jury to determine, whether the witnesses to a will (being all dead) did set their names in the presence of the testator, and this merely upon circumstances, without any positive proof. By the court; This is a matter fit to be left to the jury. The witnesses by the statute ought to set their names as witnesses, in the presence of the testator; but it is not required by the statute that this should be taken notice of in the subscription to the will; and whether inserted or not, it must be proved: if inserted, it doth not conclude, but the contrary may be proved. And if not conclusive, when inserted, the omission thereof shall not conclude that it was not so: and therefore it must be proved, by the best proof that the nature of the thing will admit of. *Comyn. 531.*

And in the case of *Croft and Pawlet, E. 12 G. 2.* Upon a trial at bar concerning the execution of a will, it did not appear upon the face of it, that the attestation of the witnesses was made in the presence of the testator; which being objected to, a case was cited, where lord chief justice Eyre held it a matter proper to be left to a jury, whether they believed it to be so done or not. And Mr justice Chappel cited a case to the same purpose. To which the court assented; and they held it not to be necessary to be inserted in the will, that the attestation was in the presence of the testator, tho' by the statute it is necessary that it should in fact be so attested. *Vin. Devise. N. 9.*

By three or four credible witnesses] *M. 1 W. Lea and Libb.* The testator made his will in writing, subscribed by two witnesses, and therein devised his lands. Afterwards he made a codicil, in which his will was recited; and this also was attested by two witnesses, one of which witnesses was a witness to the will, but the other was a new witness. The question was, whether this new witness should make a third to the will. And it was adjudged that he should not: It is true, here are three witnesses to the intent and will of the testator; but there are only two to his will in writing: It is true likewise, that there are two witnesses to the codicil; but those are not witnesses to the written will: so that there wants one witness to the will in writing. *3 Salk. 395.*

In the case of *Tuffnell and Page, E. 1740,* it was held clearly by lord Hardwicke, that a will of a copyhold tenant, attested by one or two witnesses, or even without any witness at all, is sufficient to declare the uses of a surrender which he has made; and the reason is, because the party is in by the surrender, and not by the will. *Barnard. Cha. Ca. 12.*

Credible witnesses] *M. 34 Cha. 2. Hudson's case.* Two witnesses swore, that the testator did not publish it as his will, but that another guided his hand, and that the testator made his mark but said nothing, nor was he capable. On the other side, it was proved, how that the testator had

Wills. Form and manner.

made two former wills, and in them had divided his land in the like manner as by this will, and that he died of a consumption, and was sensible to the last; and how that three days after making his last will, he was sensible and able to discourse, and so continued till within six days of his death; hereupon it appeared, that the witnesses had been dealt with. To which the counsel on the other side urged, that if the witnesses were not to be believed, then there would not be three witnesses to the will, and so no will within the statute. To which Pemberton chief justice answered, that if there were three witnesses to a will, whereof one was a thief or person not credible; yet the words of the statute being satisfied, and he having collateral proof to fortify the will, he would direct a jury to find it a good will: and as to this case, he said it was not probable, that a person in his senses (as they are not able to disprove him to be) would suffer another to guide his hand to a writing and not say any thing; and that therefore they took it he did publish it: And he remembered *Digges's* case, where the scrivener wrote the will, and two others were witnesses; the scrivener swore the testator was compos, and the two other swore he was not compos; the court stopped these two from going away till verdict was brought in, which found the will a good will, and then committed the two witnesses to the fleet; for if this was suffered, it would be in any man's power to destroy another's will. So likewise did the court here commit the witnesses, and took security of the plaintiff to prosecute them for perjury. *Skin.* 79.

Of goods.

2. A written will of goods and chattels is not altered as to this matter by the said statute, but continues as it was before.

Concerning which, it is said in 3 *Salk.* 396. that by the canon law, and also by the common law, two witnesses are requisite to prove a will for goods.

For one witness by the civil law, unto which the other laws are conformed in this matter, is as no witness at all. 1 *P. Will.* 13.

So in the case of *Thwaites* and *Smith*, *M.* 1696. Before the delegates. Where there were only three witnesses to the will, and two of them children of the residuary legatee, the will was set aside, children (by reason of the affection and duty which they owe to their parents) not being allowed to be witnesses by the civil law.—But on a commission of review being sued out, the parties agreed, and the executor renounced. And the reporter makes a query, Whether if the will in question appeared to be written or so much as subscribed by the testator's own hand, it would not have been good without any witnesses at all. 1 *P. W.* 13.

And Swinburn says, if it be certain and undoubted, that the testament is written or subscribed with the testator's own hand, in this case the testimony of witnesses is not necessary; but if it be doubtful, whether the testament were written or subscribed by the testator, in this case the testimony of witnesses is necessary, to confirm the same to be the testator's own hand. *Swin.* 353.

And altho' witnesses to prove the will may be necessary, yet it doth not seem to be of absolute necessity that the names of these witnesses should be by them subscribed to the will.

In

In the case of *Limbery* against *Mason* and *Hyde*, T. 8 G. 2. several cases were cited wherein these strict formalities were determined not to be requisite. As in the case of *Wright* and *Waltboe*, H. 1710. There were three testamentary schedules, whereof one was without date; the second was written *In witness*, but there was no witness; the third concluded abruptly: yet being written by the testator, they were declared to be his will. *Comyn.* 452.

So in the case of *Worlick* and *Pollet*, 1711. Before the delegates. The testatrix sent for a person to make her will; gave him instructions for the same; when he had wrote it, he read it to her; she approved it; declared it to be her last will; sent for three witnesses to see her execute it; *Signed and sealed* was written, but she died before any other execution: yet it was held a good will. For tho' the first sentence for it was reversed upon an appeal, yet it was afterwards affirmed by the delegates. *Comyn.* 452.

And by Gilbert chief baron: If a will be made of goods, and written in the party's own hand, without any witness at all; it is allowed to be good, and the statute doth not require any witnesses to chattels only. *Gilb. Rep.* 260.

In the case of *Brown* and *Heath*, 1721. A will of a real and personal estate was prepared in order to be executed, tho' there were several blanks in it, and the testator died before execution; yet it was held a good will for the personal estate: and tho' more was intended to be done, yet it shall be good for what is done. *Comyn.* 453.

So in the case of *Loveday* and *Claridge*, 1730. The testator intending to make his will, pulled a paper out of his pocket, wrote down some things with ink, some with a pencil, and tho' it had no conclusion, but appeared to be a draught which he intended after to finish, for it was not signed, but had at the end a calculation of his effects, an account of his tea table, and an order to pay a dividend of stocks; yet it was held to be a will. *Comyn.* 452.

So in a case where the testator gave instructions to make his will of his real and personal estate; and when it was brought to him, he made several alterations, and then wrote the whole over as altered with his own hand: this, being found in his study, tho' not signed or sealed, was held a good will (as to the personal estate). It is true, the first sentence was, that he died intestate; but that was reversed by the delegates. *Comyn.* 453.

3. By the same statute of the 29 C. 2. c. 3. *All declarations or creations of trusts or confidences, of any lands tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void, and of none effect.* s. 7. Declarations of trust.

And all grants and assignments of any trust or confidence, shall likewise be in writing, signed by the party granting or assigning the same by such last will or devise; or else shall be utterly void, and of none effect. s. 9.

4. A nuncupative testament is, when the testator without any writing doth declare his will, before a sufficient number of witnesses. *Swin.* 58. Nuncupative will.

By

Wills. Form and manner.

By the aforefaid statute, 29 C. 2. c. 3. *No nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses at the least, that were present at the making thereof; nor unless it be proved, that the testator at the time of pronouncing the same did bid the persons present or some of them bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his habitation or dwelling, or where he hath been resident for the space of ten days or more before the making of such will, except where such person was surprized or taken sick, being from his own home, and died before he returned to the place of his dwelling.* f. 19.

And after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony or the substance thereof, were committed to writing within six days after the making of the said will. f. 20.

And no letters testamentary or probate of any nuncupative will shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow or next of of kindred to the deceased, to the end they may contest the same if they please. f. 21.

Provided, that notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he might have done before the making of this act. f. 23.

And by the 4 An. c. 16. *All such witnesses as are and ought to be allowed to be good witnesses upon trials at law, by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereunto.*

By the oaths of three witnesses at the least] T. 1704. Philips and the parish of St Clement Danes. Dr Shallmer by will in writing gave 200 l to the parish of St Clement Danes; and after, Prew the reader coming to pray with him, his wife put him in mind to give 200 l more towards the charges of building their church; at which, tho' Dr Shallmer was at first disturbed, yet afterwards he said he would give it, and bid Prew take notice of it; and the next day bid Prew remember of what he had said to him the day before, and dies that day. Within three or four days after, the doctor's widow put down a memorandum in writing of the said last devise, and so did her maid. Prew died about a month after; and amongst his papers was found a memorandum of his own writing, dated three weeks after the doctor's death, of what the doctor said to him about the 200 l, and purporting that he had put it in writing the same day it was spoken; but that writing, which was mentioned to be made the same day it was spoken, did not appear; and these memorandums did not expressly agree. About a year after, on application of the parish to the commissioners of charitable uses, and producing these memorandums and proofs by Mrs Shallmer and her maid, they decreed the 200 l. But on exception taken by the executors, the decree was discharged of this

this 2001; and the lord chancellor held it not good, because it was not proved by the oath of three witnesses: for tho' Mrs. Shallmer and her maid had made proof, yet Prew was dead, and the statute in that branch requires not only three to be present, but that the proof shall be by the oath of three witnesses. 1 *Abr. Cas. Eq.* 404.

Letters testamentary or probate of any nuncupative will] *H. 22 & 23 C. 2. Verborn and Brewin.* An administrator brought a bill to discover and have an account of the intestate's estate: the defendant pleaded, that the supposed intestate made a nuncupative will, and another person executor, to whom he was accountable, and not to the plaintiff as administrator. But decreed, that tho' there was such a nuncupative will, yet it was not pleadable against an administrator before it was proved. 1 *Chan. Cas.* 192.

5. A codicil, by intendment of law, is either to alter, explain, add, Codicil. or subtract something from the will; and wherever it is added to a testament, and the testator declares that it shall be in force, in such case, if the will happens to be void for want of those solemnities required by law, yet it shall be good as a codicil, and be observed by the administrator: it is true, executors cannot regularly be appointed in a codicil, but yet they may be substituted according to the will of the testator, and the codicil is still good. *Swin.* 14.

M. 31 C. 2. Stoniwell's case. The testator made his wife executrix and residuary legatee; but she dying in his life time, he by a codicil nuncupative devised to G R all which by will he had given to his wife, and died. The question was, whether this nuncupative codicil was good, notwithstanding the statute before mentioned; and adjudged that it was, and as it were a new will for so much as he had given to his wife, and that it did not alter his written will, for there was no such will, the operation of it being determined by the death of the wife, living the testator, who was her husband. *Raym.* 334.

Altho' no man can die with two testaments, because the latter doth always infringe the former; yet a man may die with divers codicils, and the latter doth not hinder the former, so long as they be not contrary. *Swin.* 15.

If two testaments be found, and it doth not appear which was the former or latter, both testaments are void: but if two codicils be found, and it cannot be known which was first or last, and one and the same thing is given to one person in one codicil, and to another person in another codicil; the codicils are not void, but the persons therein named ought to divide the thing betwixt them. *Swin.* 15.

If codicils are regularly executed and attested, they may be proved as wills are. So if they are found written by the testator himself, they ought to be taken as part of the will, and to be proved in common form by the oath of the administrator with the will annexed; and in case of opposition, by witnesses to the handwriting and finding: And it hath been usual to exhibit an affidavit of the handwriting and finding, before a probate or administration passes even in common form.

Donatio causa
mortis.

6. *Donatio causa mortis*, or a gift in prospect of death, is where a man, moved with the consideration of his morality, doth give and deliver something to another, to be his in case the giver die, but if he lives he is to have it again. *Law of Test.* 179. *Prec. Cha.* 269.

In every such gift there must be a delivery made by the party in his last sickness; and nothing can operate as such, without having been delivered in the testator's life time, by him or his order. 3 *P. Will.* 357.

A man by his will disposed of his personal estate; and afterwards by parol gave 100l bill to one to deliver over to his nephew, if the testator should die of that sickness: And this gift was held good. *Drury and Smith.* 1 *P. W.* 404.

So where the husband upon his death bed delivered to his wife a purse of 100 guineas, bidding her apply it to no other use than her own. *Lawson and Lawson.* 1 *P. Will.* 441.

So where the husband upon his death bed drew a bill on his goldsmith, to pay his wife 100l for mourning. *ibid.*

In the case of *Smith and Casen*, 8 Dec. 1718, the master of the rolls, where jewels were given by the testator by way of *donatio causa mortis*, doubted whether this was good against debts. And it seems not; they being given in case of the donor's death, and in nature of a legacy, which therefore would be fraudulent as against creditors. 1 *P. Will.* 106.

T. 13 G. Thomson and Batty. An executor libelled in the spiritual court, for taking a tankard without his consent, on pretence that the testator gave it to the defendant if he died of his then sickness. And the court granted a prohibition; this not being a legacy, but a donation in prospect of death, the validity whereof may be tried in an action of trover. *Str.* 777.

For this is a matter of which the common law takes notice, and need not to be proved in the ecclesiastical court. 1 *P. Will.* 441. *Sel. Cas. in Chan.* 14.

Qualification
of the wit-
nesses.

7. It is said, that if the spiritual court refuse the evidence of the son to prove a will in which the father is a legatee, no prohibition is grantable. And, before the delegates; There were three witnesses to prove a nuncupative will, two of them were without exception, and the third was son to the legatee: the statute of frauds requires three competent witnesses; the question therefore was, if these three were sufficient, the son not being an evidence by the spiritual law; and adjudged, that they were; because two only were required by the spiritual law, and the third was a good witness within the intent of the act of frauds. *L. Raym.* 85.

And altho' it was a general rule in the Roman law, that no one should be permitted to bear testimony in his own cause; yet legataries were allowed to give evidence, upon this distinction, that they were particular and not universal successors, and that a testament would be valid without legataries. The difficulty also, which must frequently have occurred, in obtaining so great a number of witnesses as seven, might probably induce the Romans to be less strict, as to the persons whom they admitted upon this occasion. But by the practice of the ecclesiastical courts of this kingdom which

which have the sole cognizance of the validity of all wills as far as they relate to personal estate, no legatee, who is a subscribed witness to the will, by which he is benefited, can be admitted to give his testimony *in foro contradictorio*, as to the validity of that will, till either the value of his legacy hath been paid to him, or he hath renounced it; and in case of payment, the executor of the supposed will must release all title to any future claim upon such supposed legatee, who might otherwise be obliged to refund, if the will should be set aside; and a release in this case is always made, to the intent that the legatee may have no shadow of interest at the time of making his deposition. The same practice also prevailed at common law, in regard to witnesses who were benefited under wills disposing of real estate. And if a legatee, who was a witness to a will, had refused either to renounce his legacy, or to be paid a sum of money in lieu of it; he could not have been compelled by law to divest himself of his interest; and whilst his interest continued, his testimony was useless. And this was determined in the case of *Anstey and Dowling*, E. 19 G. 2. which was thus: James Thompson, esquire, made his will, by which he disposed of his real estate, and gave to one John Hailes and his wife 10l each for mourning, and an annuity of 20l to Elizabeth Hailes the wife of John. This will of James Thompson was regularly attested, as the statute directs, by three witnesses, of which number the above named John Hailes was one; and he refused to be paid 20l in lieu of his wife's legacy and his own. The cause was thrice argued at the bar, and the judges of the king's bench were unanimously of opinion, that a right to devise lands is not a common-law right, but depends upon powers given by statutes, the particulars of which are, that a will of lands must be in writing, signed and attested by three credible witnesses in the presence of the deviser; that these were checks to prevent men from being imposed upon; and certainly meant, that the witnesses to a will (who are required to be credible) should not be persons who are intitled to any benefit under that will; and that therefore John Hailes was not a good witness. (*Str.* 1254.) But this very singular case, and the unanimous opinion of the judges upon the meaning and intent of the statute of frauds and perjuries, gave rise to the act of parliament here following. *Harr. Justin.* B. 2. p. 49, 50.

Which act is that of the 25 G. 2. c. 6. and runs thus: *Whereas some doubts have arisen on the act for prevention of frauds and perjuries, who shall be deemed legal witnesses within the intent of the said act, it is enacted, that if any person shall attest the execution of any will or codicil which shall be made after Jun. 24. 1752, to whom any beneficial devise legacy estate interest gift or appointment of or affecting any real or personal estate (other than and except charges on lands tenements or hereditaments for payment of any debt or debts) shall be thereby given or made; such devise legacy estate interest gift or appointment shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil within the intent of the said act, notwithstanding*

such devise legacy estate interest gift or appointment mentioned in such will or codicil. s. 1.

And in case by any will or codicil any lands tenements or hereditaments are or shall be charged with any debt or debts; and any creditor, whose debt is so charged hath attested or shall attest the execution of such will or codicil; every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act. s. 2.

And if any person hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before Jun. 24. 1752, to whom any legacy or bequest is or shall be thereby given, whether charged upon lands tenements or hereditaments, or not; and such person before he shall give his testimony concerning the execution of any such will or codicil, shall have been paid, or have accepted or released, or shall have refused to accept such legacy or bequest, upon tender made thereof; such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest. s. 3.

Provided that, in case of such tender and refusal as aforesaid, such person shall be in no wise intitled to such legacy or bequest, but shall be for ever afterwards barred therefrom; and in case of such acceptance as aforesaid, such person shall retain to his own use the legacy or bequest which shall have been so paid satisfied or accepted, notwithstanding such will or codicil shall afterwards be adjudged or determined to be void, for want of due execution, or for any other cause or defect whatsoever. s. 4.

And in case any such legatee as aforesaid, who hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before the said 24th day of June 1752, shall have died in the life time of the testator, or before he shall have received or released the legacy or bequest so given to him as aforesaid, and before he shall have refused to receive such legacy or bequest, on tender made thereof; such legatee shall be deemed a legal witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest. s. 5.

Provided always, that the credit of every such witness, so attesting the execution of any such will or codicil, in any of the cases in this act before mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the court and the jury, before whom any such witness shall be examined, or his testimony or attestation made use of; or of the court of equity, in which the testimony or attestation of any such witness shall be made use of; in like manner to all intents and purposes, as the credit of witnesses in all other cases ought to be considered of and determined. s. 6.

And no person, to whom any beneficial estate interest gift or appointment shall be given or made, which is hereby enacted to be null and void as aforesaid, or who shall have refused to receive any such legacy or bequest, on tender made as aforesaid, and who shall have been examined as a witness concerning the execution of such will or codicil, shall after he shall have been so examined, demand

demand or take possession of, or receive any profits or benefit of or from any such estate interest gift or appointment, so given or made to him, in or by any such will or codicil; or demand receive or accept any such legacy or bequest, or any satisfaction or compensation for the same, in any manner or under any colour or pretence whatsoever. s. 7.

Provided, that nothing herein shall extend to the case of any heir at law, or of any devisee in a prior will or codicil of the same testator executed and attested according to the said recited act, or any person claiming under them respectively, who has been in quiet possession for the space of two years next preceding the sixth day of May 1751, as to such lands tenements and hereditaments, whereof he has been in quiet possession as aforesaid; nor to any will or codicil, the validity or due execution whereof hath been contested in any suit in law or equity commenced by the heir of such deviser, or the devisee in any such prior will or codicil, for recovering the lands tenements or hereditaments mentioned to be devised in any will or codicil so contested or any part thereof, or for obtaining any other judgment or decree relative thereto, on or before the sixth day of May 1751, and which has been already determined in favour of such heir at law or devisee in such prior will or codicil, or any person claiming under them respectively, or which is still depending, and has been prosecuted with due diligence; but the validity of every such will or codicil, and the competency of the witnesses thereto, shall be adjudged and determined in the same manner, to all intents and purposes, as if this act had never been made. s. 8.

Provided nevertheless, that no possession of any heir at law or devisee in such prior will or codicil as aforesaid, or of any person claiming under them respectively, which is consistent with, or may be warranted by or under any will or codicil attested according to the true intent and meaning of this act, or where the estate descended or might have descended to such heir at law, till a future or executory devise, by virtue of any will or codicil attested according to this act, should or might take effect, shall be deemed to be a possession within the intent and meaning of the clause herein last before contained. s. 9.

Afterwards, this matter came in consideration again, in the case of *Wyndkam and Chetwynd*, M. 31 G. 2. Which was on an issue out of chancery, *deviseavit vel non*, to try the validity of the will of one Mr Chetwynd deceased. The jury found a special verdict, with regard to the attestation of this will; wherein it was stated, that the testator died Mar. 17. 1750, leaving the will in question, which was regularly attested by three subscribing witnesses, Higden, Squire, and Baxter; that the testator was indebted about 18000l upon mortgage of his real estate, and left a personal estate to the amount of 13972l, which was greatly superior to all his specialty and simple contract debts; that he charged his real estate with the payment of his debts and legacies; that at the time of attesting this will, he was indebted to Higden the witness (who was an apothecary) about 11l, and at the time of his death about 18l, which had been paid off by the executor before the trial of the issue; that he was indebted to Squire and Baxter, the other witnesses, who were two attorneys in partnership, about 280l, at the time of attestation, which also (except a small mistake in miscasting) was out-set or discharged before the day of trial.

If these were three credible witnesses within the statute of frauds, the jury found the devise to be sufficient; otherwise insufficient.

It was argued by serjeant Prime for the plaintiff; first, That the facts, as stated, did not make them interested witnesses; secondly, That supposing them to have been interested, yet the interest was removed before the time of trial. As to the first: They are no legatees, and derive nothing from the gift or bounty of the testator; they were justly intitled to payment of their debts, tho' no will had ever been made; the personal assets were the proper fund for them to resort to, and that is sufficient to pay their demands; so that they are not interested in the charge on the real estate. As to the second point: They were competent witnesses at the time of examination, their debts being then discharged. The word *credible* in the statute is an ambiguous expression, and capable of many senses; but there seems to be a parliamentary exposition thereof in the statute of 4 & 5 Ann. c. 16. s. 14. whereby three witnesses are required to authenticate a nuncupative will, and it is declared, that such as are good witnesses in trials at common law, shall be deemed good witnesses to establish a nuncupative will. Now allowing the same exposition to take place in the statute of frauds; then, as these witnesses would be unexceptionable on a trial at law in respect of interest, so they are competent (and therefore credible) witnesses to the present devise. And in this, and the former argument, there were cited divers cases to this purpose.

On the other side, Mr Norton argued for the defendant; that at the time of the *attestation* the witnesses were interested, and therefore incompetent, and that this, and not the time of examination, is the proper time of inspecting their credibility; else it would open greater opportunities of fraud and perjury, than before the act; it would be setting up witnesses to hire; and would put the validity of the will in the power of the witnesses, by releasing or not releasing their interest. If a witness is unexceptionable at the time of attestation, and afterwards becomes infamous or insane; the will is nevertheless a good will: which proves that his condition at the time of attestation is alone to be regarded. And to this purpose were cited also divers cases; and it was observed, that most of the cases cited on the other side were prior to the statute of frauds. He insisted, that the word *credible* means something more than *competent*: the law required competency before; and it is not to be imagined, that the learned compiler of this statute (lord Hale) would put in a word, which at best was superfluous: That in the statute of the 13 C. 2. against deerstealing, and in all the game laws, the expression of *credible* witnesses is used, which hath always been understood to mean more than *competent*, and to give the justices a discretion whether they will convict upon such testimony or not, tho' the witness was in law strictly admissible. And he insisted on two cases, as directly in point; viz. *Hilliard and Jennings*, 1 L. Raym. 505. And *Ansty and Dovesing*, 19 G. 2.

On the argument, lord Mansfield expressed his doubts of that generally received opinion, that lord Hale drew the statute of frauds, 29 C. 2. he having died in 1676, in the 28 C. 2. and observed also, that the statute of the 4 & 5 An. was enacted to check the extravagant notions of some

some civilians, by which they excluded from being witnesses the children and family of the testator, as well as of the legatee; arising from a fiction in the Roman law, by which testaments are transacted in the form of a sale between the devisor and the devisee, to which none of either family were allowed to be witnesses.

Afterwards in the same term, lord Mansfield delivered the opinion of the court. In this case the real estate is only charged with payment of debts, as an auxiliary fund to the personality; which stands in need of no assistance, being it self much greater than the debts: and at the time of trial, the three witnesses were not creditors to either the real or personal estate, but were so at the time of attestation. And herein the question is, whether this be a valid attestation, according to the statute of frauds. This is a doubt which sprang out of the general question in *Ansty* and *Dowling*, whether a benefit to a witness arising from a will shall annul his testimony, tho' at or after the testator's death he becomes totally disinterested. The solution of this question depends upon general principles; not upon the words of the statute. The statute declares no incapacity, lays down no legal conditions for admitting witnesses. The word *credible* is no term of art: it has only one signification, and that universally received: it is never used as synonymous to legal competency: it presupposes evidence to have been already given. The consideration of competent, is previous to that of credible; and in the statutes which have been mentioned at the bar, the expression so frequently used of credible witnesses, is never construed to mean competent. To make the validity of a will depend upon the credibility of the witnesses, would be absurd; since the testator could never foresee what credit might hereafter be given to them. It is true, that in *Butler* and *Baker's* case, 3 Co. 36. the third caution there given is, to call credible witnesses: But that is only a loose and casual expression; tho' perhaps the penner of this statute might take his hint from thence. I cannot conceive (for the reasons I formerly mentioned) that this statute was drawn by lord Hale, any further than perhaps by leaving some loose notes, which were afterwards unskillfully digested. I therefore think, that the epithet *credible*, in this statute is used as a word of course, but is unfortunately misapplied: if it signifies competent, that is implied in the word witness alone; if it signifies any thing more than competent, it is (as was before observed) absurd. Perpetual doubts have arisen upon every clause of this statute, not only among the unlearned, for whom it ought to have been calculated; but even amongst the learned also. In a statute so inaccurate, I therefore think the word *credible* might accidentally slip in, and ought not to be attended to as if it carried any special legal meaning. I shall therefore consider the statute, as only requiring the attestation of three subscribing witnesses, that is, legal competent witnesses; and cannot but observe, that the necessity of having subscribing witnesses to any instrument never existed before in this country. The statute determines no point of time for the competence of witnesses; and as I think that competence is not confined to the time of attestation, so I think that the incompetence of witnesses

witnesses at the time of examination could never be intended for a question by the legislature, since however competent at the time of attesting, they may become insane or infamous before the time of examination.

The competence of witnesses to wills, must therefore depend upon the general rules of competence for all other witnesses. I will therefore consider, first, How this matter of competent attestation would have stood upon general principles, supposing no judicial determination had been given: Secondly, How the authority of judicial determinations stands; for if there are any in point, they are certainly proper to be adhered to: And, thirdly, How these two rules may be applied to the present case.

First, As to general principles: The power of devising ought to be favoured. It naturally follows the right of propriety. It subsisted in this Kingdom before the conquest, and till about the reign of king Henry the second, when it ceased by consequence of feudal tenure, not from any express prohibition. The doctrine of uses revived this power; and the statute of uses again accidentally checked it. This occasioned the statute of wills to be soon after made; which received a great enlargement by the alteration of tenures in the reign of king Charles the second. And this testamentary power over property is more reasonable in this kingdom, than ever it was among the Greeks and Romans; since by reason of primogeniture, and other exclusive rules of descent, the succession ab intestato amongst us is not so equal and universal as among those people. The statute of the 29 C. 2. was not meant to check this power, but only to guard against fraud. In theory it seemed a strong guard: In practice it may be some guard: But I believe more fair wills have been destroyed for want of observing its restrictions, than fraudulent wills obstructed by its caution. In all my experience at the court of delegates (and I have heard the same from many learned civilians), I never knew a fraudulent will which was not legally attested. Courts of justice ought therefore to lean rather against, than in support of, any too rigid formalities. And upon this principle, before the statute, in the year 1658, it was held, 2 Sid. 139. that the parishioners might be witnesses to a devise, tho' it was for the benefit of their own poor. Interest in a witness is certainly an objection to his competency: This arises from a presumption of bias: It is no positive disability; as if a particular age was required and wanting in a witness: It is only presumptive; and presumptions only stand until the contrary is made apparent: If the bias be taken off, the objection ceases. There is no presumption of bias in a witness, who at the time of signing probably knew not the contents of the testator's will, and after his death is discharged from, or has renounced all interest arising from thence. Nothing can be more reasonable, than to allow this objection of interest to be purged by matter subsequent to the attestation, and previous to the trial, if it were only for the benefit of third persons. Shall tokens of kindness to friends, servants, or the like, who may be unwarily called in as witnesses, vitiate a solemn and well-weighed disposition of a man's estate; when by payment or release this interest may be at once removed? This seems the more unreasonable, since there are methods by which legatees may by circuitry be witnesses to a devise in their own
favour,

favour, without either payment or release: If land be once charged with legacies by a well attested will; legacies may be given by an unattested codicil to the witnesses of that very will.

As to the judicial authorities: In all cases of testimony it hath often been determined, that a release takes off all objection in point of interest. And therefore I give credit to the dictum of judge Powis, in *Viner*, Tit. Evidence. F. sect. 53. not on the authority of the reporter, but because it is consonant to the known practice of Westminster-hall in other cases. The case of *Hillyard* and *Jennings* (of which, Carthew's is the best report, he having been counsel in the cause) in substance is much the same as that of *Anstey* and *Dowsing*. In this last case, the wife of one of the witnesses had an annuity charged on the lands devised; no release was had; no payment, no tender, could be made; and as husband and wife are considered as one person, this was a material objection to his testimony; and it was upon the particular circumstances of that case, and not upon any general doctrine, that the judgment in that case was founded, as Mr justice Denison soon after assured me. It is true, the lord chief justice Lee, in delivering his opinion, went into the general point, and argued as if the credit of a witness could not be purged or varied by any act subsequent to the attestation; which he grounded on a maxim of the Roman law, *conditionem testium inspicere debemus eo tempore cum signarent*: But this was not sufficiently considered; as will appear from a short view of the Roman testaments, which originally could only be made as a legislative act *in præcinctu*, or *in comitiis calatis*; but after the law of the twelve tables, which gave the power of private testaments, testamentary matters were usually transacted *per os et libram*, under the fiction and in the form of a sale or contract before the testator and the legatees. These symbols were used before the introduction of written instruments, and to this symbolical sale five, and afterwards to the written instrument seven witnesses were required, who must be citizens, freemen, adults, and attended with other qualifications. This positive capacity was the condition of the witnesses referred to in the Roman law; which was requisite to be in them at the time of their attestation or signing, and not afterwards; in like manner as where a surrender must be made into the hands of two copyhold tenants, it will not be good if made into the hands of a stranger, tho' he should afterwards become a copyholder. The interest of the witnesses was not in the contemplation of the law; for heirs were admitted as subscribing witnesses after the symbolical sale had ceased, as were also *cestui que trusts* and legatees. The consequence of this doctrine of lord chief justice Lee was, that no creditors or legatees, if the estate was charged to pay them, could at any rate be good witnesses. And yet when lord *Aylesbury* died in February 1746, leaving a new made will, witnessed by three servants, to all of whom he had left legacies charged on lands, which they released before examination, and it appearing that by a former will dated in 1744, and witnessed by other persons, he had left the same legacies, the lord chancellor in 1748 held them to be good witnesses to the second will, for it was indifferent to them which will should stand good, and besides they had released. And in the case of

Baugh

Baugh and Holloway, 1 *P. Will.* 557. Lord Raymond lays down the same general doctrine that I would now establish; and also another point, which agrees with my opinion, that an interested witness may prove a devise to another, tho' not to himself. In all judicial determinations, devises have been considered, not in the nature of wills by the Roman law, but as dispositions and conveyances of real estates; whence it is, that by such disposition of all one's estate, lands that are purchased subsequent thereto will not pass: Therefore the interest of witnesses to devises should be governed by the same rules, as in all other written dispositions of real estates. As to the notion started in the argument of *Ansty* and *Dowling*, of four devisee witnesses dividing an estate among themselves, by reciprocally attesting for each other; this might as well be effected by four distinct devises separately attested by three of them in rotation: But in either case, the very contrivance would appear so fraudulent, as alone to be sufficient to set it aside.

With respect to the present case: My opinion is, that a charge of debts upon the real estate ought not to incapacitate witnesses, who are creditors, from proving a testament. This clause ought to be in every conscientious will; and the man who omits it has been very justly said to sin in his grave. This would be my opinion, even if the witness sought or wanted a benefit under such a will; but in this case there is no occasion to resort to the real estate, the personal is more than sufficient to pay the debts of the witnesses, and they have been already paid. Therefore we are all of opinion, that the will is duly attested by three witnesses.

Appointing of
guardians.

8. Dr Swinburne says, By general custom observed within the province of York, the father by his last will or testament may for a time commit the tuition of his child, and the custody of his portion; which testament and assignation is to be confirmed by the ordinary, who also is to provide for the execution of the same testament. *Swin.* 210.

And if the father die, no tutor being by him assigned, and the mother do in her last will and testament appoint a tutor; the same will is to be proved, and the assignation of the tutor confirmed. *Swin.* 210.

And if no tutor be assigned by either of the parents, then may a stranger, if he make the orphan his executor, and give him his goods, assign a tutor unto him [with respect to such goods]; which tutor is by the ordinary to be confirmed. *Swin.* 210.

And if there be no tutor testamentary at all, then may the ordinary commit the tuition of the child to his next kinsman demanding the same, according as in administrations where any dieth intestate. *Swin.* 211.

And by the said custom a tutor may be assigned to a boy at any time until he hath accomplished the age of fourteen years, and to a girl until she hath accomplished the age of twelve years. But after those years, he or she respectively may chuse their own curators. But if they do not elect any other curator after their several ages, then he that is assigned in the will is to be confirmed curator to either of the said children, albeit he were above fourteen years, and she above twelve, when the will was made. *Swin.* 212. And this is according to the rules of the civil law; but by the common law, the age of chusing guardians both as to the male and female is the age of fourteen. 1 *Inst.* 78. And

And by the said general custom observed within the province of York, a tutor may be assigned either simply or conditionally, and until a certain time, or from a certain time. But no tutor may intermeddle as tutor, until he be confirmed by the ordinary, albeit he be assigned tutor simply; much less where he is assigned conditionally, or from a certain time, may he intermeddle as tutor, until the condition be extant, or the time limited be expired. But the ordinary may in the mean time commit the tuition; and he that is so appointed by the ordinary, may for that time administer. *Swin. 215.*

But, more generally, by the statute of the 12 C. 2. c. 24. (which controlleth the aforesaid custom in divers instances) *Where any person shall have any child or children under the age of twenty one years and not married, at the time of his death; it shall be lawful for the father of such child or children, whether born at the time of the decease of such father, or at that time in ventre sa mere, or whether such father be within the age of twenty one years or of full age, by his deed executed in his life time, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time, as he shall think fit, to dispose of the custody and tuition of such child or children during such time as he or they shall respectively remain under the age of twenty one years, or any lesser time, to any person or persons, in possession or remainder, other than popish recusants: and such person to whom the custody of such child shall be so disposed or devised, may maintain an action of ravishment of ward or trespass, against any person who shall wrongfully take away or detain any such child, for the recovery of such child, and recover damages for the same in the said action, for the use and benefit of such child. s. 8.*

And such person to whom the custody of such child shall be so disposed or devised, may take into his custody to the use of such child, the profits of all lands tenements and hereditaments of such child, and also the custody tuition and management of the goods chattels and personal estate of such child, till his or her age of twenty one years, or any lesser time, according to such disposition aforesaid; and may bring such actions in relation thereto, as by law a guardian in common socage might do. s. 9.

Provided, that this shall not extend to alter or prejudice the custom of the city of London, nor of any other city or town corporate, or of the town of Berwick upon Tweed, concerning orphans. s. 10.

Shall have any child or children under the age of twenty one years] By the common law, there were four sorts of guardians: 1. Guardian in chivalry. If the tenant by knight's service died, his heir male being under twelve years of age; in such case, the lord should have the land holden of him, until the heir should attain the age of twenty one, and likewise the marriage of the heir, if he was unmarried at the death of his ancestor; if there was an heir female, under the age of fourteen, and unmarried, then the lord had the wardship of the land till her age of sixteen, and was to tender to her covenable marriage without disparagement. And this sort of guardianship was a kind of dominion of lords over their tenants, and was introduced among the Gothic nations, to breed them to

arms; but is now fallen with the tenures, for by this same statute all tenures by knight's service and in capite are taken away, and turned into free and common socage. 2. Guardian *by nature*; as the father is of his eldest son, till he comes to the age of twenty one years. But this is with respect to the custody of the body only. And this extendeth only to the heir apparent, and not to the younger children; the true reason of which is, because they cannot inherit any thing from him. But it extendeth to the daughter, whilst she is heir apparent; but not after the birth of a son, for then he is heir apparent, and not the daughter. 3. Guardian *in socage*: And this is, where the tenant in socage dies, his issue whether male or female (or if no issue, his brother or cousin) being under the age of fourteen; in which case, the next of blood, to whom the inheritance cannot descend, shall have the wardship of the land and body, till the age of fourteen years. 4. Guardian *by nurture*: And this may be, tho' no land descends; whereas guardian in socage must be, where land in socage descends. And such guardian hath nothing but the governance of the child, until the age of discretion, to wit, fourteen years, whether the infant be male or female. And none can be guardian by nurture, but the father or mother. 1 *Inst.* 74. 87, 88. *Viner.* Guardian. N. 2.

Guardians appointed by the spiritual court are only for the personal estate; guardians for the real estate were heretofore under the direction of the court of wards and liveries, which court being taken away by this statute, power is given by the same statute to the father by his deed or will to appoint guardians; which if he shall not do, or if the guardians appointed by him shall die or refuse to act, then the power devolveth upon the high court of chancery, the lord chancellor (under the king) being the supreme guardian of all infants and others not capable to act for themselves.

It shall be lawful for the father] By the common law, before this act, it was not lawful for the father to appoint a guardian either in chivalry or socage; but the law appointed one for him: and in such case, the guardian appointed by the law could not refuse; but the guardian appointed by the father, under the statute, may refuse, if he pleaseth. *Vaugh.* 182.

For the father] Therefore the act only authorizeth the father, and not the mother; altho' she hath the same concern for her heir as the father. And as the father only can appoint a guardian, so therefore the guardian appointed by him cannot appoint another guardian; for it is a personal trust, and not assignable, any more than guardianship in socage. *Vaugh.* 179.

But here being no negative words, this altereth not the custom within the province of York (as hath been expressed) for the mother by her will to appoint a guardian; that is, with respect to the personal estate; for unto that only the custom must be understood to extend; for when that custom first took place, the law it self appointed guardians for the real estate, in chivalry or in socage.

In ventre sa mere] In like manner, by the custom within the province of York, a tutor may be assigned to a child that is not born, as also to an idiot or a lunatick. *Swin.* 212.

But this statute gives no power to the father to appoint a guardian to his child being an idiot or a lunatick, after he shall be of the age of twenty one years.

Whether such father be within the age of twenty one years, or of full age] Therefore the father, under the age of twenty one, may grant the custody of his heir; but he cannot demise or devise his land in trust for him directly: but he may do it obliquely; for by appointing the custody, the land follows as an incident given by the law to attend it. *Vaugh.* 178.

By his deed executed in his life time, or by his last will] In the case of the earl of Shaftesbury and Hannam, where the father had given the guardianship of the infant to one by deed, and to the mother by will, it was decreed, that the will was a revocation of the deed. *Cha. Ca. Finch.* 323.

By his last will] And such will need not to be proved in the spiritual court. *1 Ventr.* 207. That is to say, if the will is merely upon this statute, for the appointing a guardian and nothing else; for in such case, the appointment being solely by act of parliament, the temporal courts shall be judges thereof. But in the same will, if there is any disposition of the personalty (as is most commonly the case); it seemeth that the will shall be proved in the spiritual court for the whole: which probate shall be effectual so far as the personalty is concerned, altho' it shall be of no avail with respect to such particular appointment of a guardian by the statute. Also this consideration shall not be extended to take away any power from the spiritual court which it had before; as particularly, within the province of York (as before mentioned), or within any of the places specially excepted by the statute.

In such manner, and from time to time, as he shall think fit] It seemeth not to be material by what words the tutor is appointed, so that the testator's meaning do appear. Wherefore if the testator say, I commit my children to the power of such a one; or, I leave them in his hands; it is in effect as if the testator had said, I make him tutor to my children. So it is, if he say, I leave them to his government, regimen, administration, or the like. For in all things the will and meaning of the testator is to be observed, and preferred before the propriety of the words, whereof perhaps he is ignorant; which meaning is to be collected by that which went before or followeth in the will, and by other circumstances, which the judge ought to inquire. *Swin.* 216.

Under the age of twenty one years, or any lesser time] By the common law, the guardianship in focage (as was observed before), was only to the age of fourteen. *Vaugh.* 179.

Or any lesser time] If a man deviseth the custody of his heir apparent and no time is mentioned; yet it is a good devise of the custody within the act, if the heir be under fourteen at the death of the father: because by the devise, the guardianship is changed only as to the person, and less the same as to the time. But if the heir be above fourteen, then the devise is void for the uncertainty; for the act did not intend every heir should be in custody till twenty one, but only so long as the father shall appoint, not exceeding that time. *Vaugh.* 184.

To any person or persons in possession or remainder, other than popish recusants] Yet there are other exceptions: As, by the 9 & 10 W. c. 32. Persons denying the trinity, or asserting that there are more gods than one, or denying the christian religion to be true, or the holy scriptures to be of divine authority, shall for the second offence be disabled to be guardians.

And by the statutes relating to the qualification for offices, persons executing their respective offices without taking the oaths and performing the other requisities for their qualification, shall be disabled to be guardians.

Also, in general, he that cannot be an executor, cannot be a guardian. *Swin.* 211.

May maintain an action of ravishment of ward] The ecclesiastical court cannot intermeddle with the *body*, altho' the parents make no disposition thereof. 3 *Keb.* 834.

But by the express words of this act, the guardian by will takes place of all other guardians; and the guardian under this statute may have ravishment of ward, as the guardian by knight's service or in socage at common law might have had. 3 *Keb.* 528. 2 *P. Will.* 115.

May take into his custody, to the use of such child] This guardian being made after the model of a socage guardian, and coming in the place of the father, hath not a bare authority, but an interest; but it is only an interest joined with his trust (as being necessary in order to the performance of the trust), but not an interest for himself. *Vaugh.* 181, 183. 2 *P. Will.* 122.

The profits of all lands] A guardian by nurture, being so appointed by the testator's will, can only lease at will, and not for any number of years; for the guardian himself (except he be guardian in socage) is only tenant at will. *Cro. Eliz.* 678, 734. 8 *Mod.* 312.

Of all lands, tenements, and hereditaments of such child] It seemeth that this guardian shall have the custody, not only of lands descended, or left by the father, but of all lands and goods any way acquired or purchased by the infant (which the guardian in socage had not); which proves that he derives not his interest from the father, but from the law; for the father could never give him power or interest of or in that which was never his. 2 *P. Will.* 185.

And also the custody, tuition, and management of the goods] Swinburn says, the office of a tutor is, to provide that his pupil be honestly and virtuously

virtuously brought up; and to provide for him meat, drink, cloaths, lodging, and other necessaries, according to the child's estate, condition, and ability. *Swin. 217.*

And the same also doth further consist, in the good and faithful administering or disposing of the goods and chattels of the said pupil; that is to say, the tutor may not commit any thing that may be hurtful, nor omit any thing that may be profitable to his pupil, and in the end must restore unto his pupil all his goods and chattels, by him the said tutor before received. And for that purpose every tutor ought, even at the very entry into his office, to make a true inventory of all the goods and chattels of his pupil, and to make a just and true account of his dealings in behalf of his pupil. And it is generally observed within the said province of York, that every tutor, as well testamentary as other appointed by the ordinary, doth enter into bond with sureties to the effect aforesaid, according to the discretion of the ordinary. *Swin. 217.*

The tutor may sell such goods belonging to the pupil, as cannot be kept until he come to lawful age. But other goods which may conveniently be kept, and especially goods immoveable, the tutor may not sell; unless otherwise ordered by will. *Swin. 217.*

More particularly; The guardian ought to apply the estate in his hands, to pay the *debts* of the infant. *1 Cha. Ca. 157.*

He may pay off the *interest* of any real incumbrance, and the *principal* of a *mortgage*; because it is an immediate charge on the land: but no other real incumbrance. *Prec. Cha. 137.*

In the case of *Waters and Ebral, H. 1707.* where the mother, as guardian, received the rents of the estate, and paid off specialties, but took assignment, and after the death of the infant brought a bill against the heir for a discovery of assets by descent (she claiming the rents received as administratrix); it was held by the court, that the guardian is not compellable to apply the profits of the estate of the infant, to pay off the *bond debts* of the ancestor. *2 Vern. 606.*

In the case of the earl of *Winchelsea and Norcliff, T. 1686.* A guardian, having a considerable sum of money in his hands, laid it out in a *purchase* of lands, for the benefit of the infant, if when he came of age he should agree to it; the infant dying in his minority, it was decreed, that the guardian should account for the money to the administrator of the infant; for that he could not, without the direction of the court, convert the personal into real estate. *1 Vern. 403, 435.*

M. 35 C. 2. Osborn and Chapman. A guardian, at the request of one who was going to marry the ward, gave in an account of the estate to the intended husband, and secured to him the balance by three several bonds; and the intended husband gave a bond to the guardian, to release all accounts to him after the marriage: The marriage was had: The guardian paid the balance: But the husband gave no release, but sued for an account, and relief against the bond. And the guardian was ordered to answer the bill: For the account was made when the intended husband had no title; no release was given; and the pursuit is fresh. *2 Cha. Ca. 157.*

For, by Cowper lord Chancellor; Wherever a father, mother, or guardian insists upon private gain, or security for it, and obtains it of the intended husband, it shall be set aside. 1 *Salk.* 158. 2 *Vern.* 652.

For marriage brocage agreements have been often condemned in equity. And a bond to give money if such a marriage could be obtained, is ill. And so is a bond to forgive a sum of money. For such bonds, altho' good at law, yet being introductive of infinite mischief, have upon great consideration been condemned in equity. 3 *P. Will.* 394.

But a guardian, upon account, shall have allowance of all reasonable costs and expences in all things. *Litt. sect.* 123.

And if he receive the rents and profits, and be robbed without his default or negligence, he shall be discharged thereof. 1 *Inst.* 89.

By the statute of the 4 *An. c.* 16. actions of account may be brought against the executors or administrators of guardians.

And by the 6 *An. c.* 18. *f.* 5. Any person, who as guardian or trustee for any infant shall hold over after the determination of the particular estate, without consent of the person next intitled, shall be adjudged a trespasser, and shall pay damages to the value of the profits received.

And may bring such actions in relation thereto, as by law a guardian in common soccage might do] And he may also submit matters to arbitration; for tho' the infant cannot submit to an award, yet the guardian may do it for him, and bind himself that the infant shall perform it. *Comb.* 318.

An infant may sue either by his guardian or next friend; but must defend by his guardian. *Cro. Jac.* 641.

And if an infant refuseth to name a guardian to appear by; the plaintiff, by order of court, may do it for him. *Str.* 1076.

And when an infant brings an action by his guardian, the warrant for him to appear by guardian ought to be entred upon record, because it is the act of the court; for the court takes care of infants, that none shall sue for them, but those that are responsible; for if the infant be prejudiced, he may have his action against him. *L. Raym.* 232.

But the suit is not in the name of the guardian, but of the infant: for at this day, a guardian doth not act in any cause for a minor in his own name, as guardian; but the minor acts in his own name by his guardian. 1 *Ought.* 337. 359.

Appointing of
executors.

9. By the 9 & 10 *W. c.* 32. Persons denying the trinity, or asserting that there are more gods than one, or denying the christian religion to be true, or the holy scriptures to be of divine authority, shall for the second offence be disabled to be executors.

By the 5 *G. c.* 27. Artificers going out of the kingdom, and exercising their trades in foreign parts, shall be incapable of the office of executor.

And by the acts for the qualification for offices, persons not having taken the oaths and performed the other requisites for qualifying, who shall execute their respective offices after the time limited for their qualification shall be expired, shall be disabled to be executors.

An infant may be made executor, how young soever he be. *Swin.* 331.

And

And if the infant executor be so young, that he hath no discretion (for it is not only lawful to make such an one executor, but also the child in the mother's womb and unborn at the death of the testator); in that case the ordinary, or other to whom the approbation of the testament appertaineth, after the birth of the child, doth commit the execution of the will to the tutor of the child for the child's behoof, until he be able to execute the same himself; which tutor hath authority to deal as executor until the child be able to undertake the executorship, that is to say, until he be of the age of seventeen years. During which minority, the administrator to the child's use cannot sell or alienate any of the goods of the deceased, unless it be upon necessity; as for the payment of the deceased's debts, or that the goods would otherwise perish; nor let a lease for a longer term than whilst the executor shall be in minority, because having that office for the good and benefit of the child only, he may not do any thing to his prejudice. *Swin. 359, 360.*

And after his age of seventeen years, before he shall come to the age of twenty one, an act done by such infant as executor, as (for instance) the releasing of a debt due to the testator, or the selling or distributing of the testator's goods, is said to be sufficient in law: Which is to be understood, upon true payment and satisfaction of the due to the deceased, made to the executor in minority; for then he may acquit and discharge the debtor for so much as he doth receive; for therein he doth perform the office and duty of an executor, which he is enabled to do; and so doing, his act shall bind him. But if he shall release without satisfaction, this act is not according to the office and duty of an executor; and therefore being without the compass of his office and duty, shall not bind or bar him from recovery thereof: for if it should, then should it be a *devastavit*, and charge the minor out of his own proper goods; which cannot be by law: for an infant may better his estate, but not make it worse, by contracting with or acquitting of another person. *Swin. 358, 359. 2 Bac. Abr. 377.*

M. 1730. Jones and the earl of Strafford. In the case where an administration is granted during the minority of an infant executrix being under the age of seventeen years, and she marries a husband of age, King lord chancellor and Raymond chief justice strongly inclined against the opinion reported by lord Coke in *Prince's case*, that such administration during the minority of the executrix is determined: the same being extrajudicial in that case, and not taken notice of by other cotemporary reporters; and the author of the book intitled *The office of executors*, mentioning this opinion, a little marvels thereat, considering (as he observes) that these things are managed in the spiritual court, and by the canon law, which intermeddles not with the husband in the wife's case; and that by that law, and not by the common law, comes in this limitation of seventeen years; and he adds, that he hath seen that case otherwise reported in this point. *3 P. Will. 88.*

Swinburne says, If a wife during the coverture be named executrix, she alone cannot sue for any debt due to the testator, without her husband. But (he says) she alone may do any act extrajudicial, as the paying of debts

debts or legacies, or the receiving or releasing of any debts due to the testator. *Swin.* 417.

And the husband and wife being but one person in law, she cannot be executrix without his assent; for if she might, then he would be executor against his will: therefore if she is made executrix, she cannot bring an action alone, but her husband must join with her; and if he should refuse, he cannot be compelled, nor can she be compelled to plead without her husband. *Swin.* 417, 418.

But (he says) altho' she cannot sue or be sued without him, yet she may deliver any of the testator's goods to another to keep; and may pay legacies, and receive debts, and give acquittances without her husband; and if any *devastavit* is made by giving acquittances, it shall bind them both, because she could not administer without his assent; and it shall be accounted his folly to suffer such a person to administer. *Swin.* 418.

But it seemeth that this must be understood only according to the spiritual law, which in this case maketh no difference betwixt married and sole: for otherwise it is by the common law.

For by the common law, the assent to a legacy by a feme covert executrix is not good, unless her husband assent to it also; otherwise it is void: but the assent to such legacy by her husband is good. *Law of Ex.* 264. *2 Bac. Abr.* 378.

And the release of a feme covert executrix is not good; for she can do nothing to the prejudice of her husband: but without question the release of the husband is good. *Curson* 53. *1 Roll's Abr.* 924.

And this, not only during the marriage, but also after the death of the husband. But if the wife die, the husband cannot convert any of the goods and chattels belonging to the first testator to his own proper use; for of such goods the wife her self may make a testament (*Swinburne* says) appointing an executor, without the licence of her husband. *Swin.* 417.

And if the husband commits waste, and then she dies; there is no remedy at common law against her husband, but only in the spiritual court, where he will be compelled to make restitution. *1 Roll's Abr.* 919.

Altho' an executor becomes a *bankrupt*, yet administration cannot be committed to another; but if an executor become *non compos*, the spiritual court may commit administration. *2 Bac. Abr.* 376.

And in the court of chancery, forasmuch as an executor is considered only as a trustee; if he be insolvent, that court will oblige him, as they will any other trustee, to give security before he enters upon the trust. *2 Bac. Abr.* 377.

And by a constitution of archbishop Stratford, the executor at the time of proving the will, shall give security (if need be) to render a just account of his administration, when duly thereunto required by the ordinary. *Lind.* 177.

As to the *form and manner* of making an executor in the will, it is not always necessary to express this word *executor*, neither hath every testator skill so to do; but it is sufficient, if the testator's meaning do appear by other words of like sense or import: as, if the testator say, I commit all my

my goods to the disposition of *AB*; or, I leave all my goods, or the residue of all my goods to *AB*, or the like; for in these cases, he to whom all the residue is bequeathed, is thereby understood to be made executor.

Swin. 247.

10. Overseers of a will have no power to intermeddle, otherwise than Supervisors, by counsel and advice, or by complaining in the spiritual court. *Went.*

9, 10.

Sir Thomas Ridley takes occasion to wish, that they might be made of more use; altho' at present (he says) they be looked upon only as candle holders; having no power to do any thing but hold the candle, while the executors tell the deceased's money. *Ridley. Part 4. Ch. 2.*

11. If the testator shew the will unto the witnesses, saying, This is my last will and testament, or, Herein is contained my last will; this is sufficient without making the witnesses privy to the contents thereof, provided the witnesses be able to prove the identity of the writing, that is to say, that the writing now shewed is the very same writing which the testator in his life time affirmed before them to be his will, or to contain his last will and testament. *Swin.* 52. *God. O. L.* 66.

Attesting the execution of the will.

Whether it is necessary, that the testator should declare to the witnesses, at the time of the attestation, that the writing which they attest is his will, hath been matter of some doubt. As in the case of *Wallis* and *Wallis*, *T.* 1762. Thomas Wallis, esquire, made his will, and therein devised his real estate to his wife for life; the will was of his own hand writing; and the form of attestation was in these words, *signed, sealed, published, and declared for the last will and testament of the said Thomas Wallis, in the presence of us &c, Isabella Matthews, James Wardell, William Powell.* The heir at law brought an ejectment. The widow pleaded the devise to her for life. The cause came on to be heard at the summer assizes at Lincoln, 1762, by a special jury, before Mr justice Denison. To prove the execution of the will, the defendant produced William Powell, the testator's coachman, one of the three subscribing witnesses, who deposed, that in the beginning of July 1760, James Wardell, then butler to the said Thomas Wallis, came and told him the said Powell that he was to come to his master; that upon entering the room, he found his master sitting with a table before him, on which were some papers open; and that his master called him, and the said Wardell, and one Isabella Matthews then his housekeeper, up to the table to him; where they all came. Then the said Thomas Wallis, further addressing himself to them all, desired them to take notice; and then took a pen, and in all their presence signed and sealed each part of his will, and laid both the said parts open and unfolded before them to subscribe their names as witnesses thereto; which they all did, by the direction of the said Thomas Wallis, in his presence, and in the presence of each other; he shewing them severally where to write their names. But that the said Thomas Wallis, otherwise than as above, did not declare or publish either part to be his will, or say what it was. The counsel for the plaintiff contended, that this was not a sufficient proof by one witness, of a compleat execution of the will. And they produced on the other hand, the other two subscribing witnesses; who

in divers particulars did not give a clear and distinct evidence; and could not recollect whether they had signed one or two papers; or whether then, or at any time before the said Thomas Wallis's death, they understood what they had so witnessed to be the said Thomas Wallis's will, tho' Wardell seemed to admit he conjectured it so to be. But both Wardell and Matthews swore, that they did not see the said Thomas Wallis sign or seal either part of his said will; that Powell, the other subscribing witness, was not at that time in the room, when (at the said Thomas Wallis's desire) they wrote their names to the two papers as they now appear; that the said Thomas Wallis did not declare or publish it as his will, nor did they know it to be a will. The defendant's counsel then called Richard Price, the said Thomas Wallis's groom, who swore, that one morning in the beginning of July 1760, James Wardell told him that his master had much wanted him; and that upon his the said Price's offering to go to his master to receive his orders, the said Wardell told Price that the business was done, and that Powell had supplied his place; and that he the said William Powell, James Wardell, and Isabella Matthews had that morning been witnessing their master's will. And Sarah Dixon being called swore, that in the beginning of July 1760, Isabella Matthews came one morning after breakfast into the kitchen, and told her that she the said Matthews, James Wardell, and William Powell, had that morning witnessed their master's the said Thomas Wallis's will, tho' he had not told them it was so. Upon this state of the evidence on both sides, it was insisted for the plaintiff, that as the law stood before the statute of frauds, *publication* of a will was an essential part thereof; and if so, there is nothing in that statute to take it away: And further it was insisted, that by the said statute there are four requisites to constitute a good and valid devise of lands; 1. That it shall be in writing. 2. That it shall be signed by the party devising, or by some other person in his presence and by his express directions. 3. That it shall be attested and subscribed in the presence of the devisor by three or four credible witnesses. 4. That the words *attested and subscribed* must import, that it shall be published as a devise or will by the testator in the presence of the said witnesses. On the contrary, for the defendant it was insisted, that neither before nor since the statute publication was necessary; and that by the statute, only the three first requisites are necessary, which in the present case were all complied with, the devise being in writing, and signed by the testator in the presence of three credible witnesses, who had subscribed their names as witnesses to the same in the presence of the testator and of each other; and further, supposing any such publication was necessary, that the testator had used words and done acts which amounted to a publication within the meaning of the statute, which had not directed or prescribed any particular form or manner in which such publication should be made; that the testator using these significant words to all the witnesses when he called them up to the table "*take notice*", and then signing both parts of his will, and then delivering both the parts thereof to the witnesses to attest, directing them where to sign their names, and to witness each part under the common and usual form of attestation, which

which the witnesses did, was a sufficient execution and publication of his will; that the words "*signed, sealed, published, and declared,*" being all written in the testator's own handwriting, and the witness Powell swearing that both the parts of the will lay open to the inspection of all the witnesses when they subscribed their names, and it appearing by the evidence of Price and Dixon that both the other witnesses had declared that they had been attesting the said Thomas Wallis's will, this was much stronger than the case of *Peate and Ougly*, reported in *Comyns* 197. And Mr justice Denison was of opinion, if the witnesses for the defendant were credited by the jury, that this was a due execution within the statute, and a sufficient publication; and for this cited the case of *Trimmer and Jackson* lately determined in the court of king's bench. And the jury found accordingly a verdict for Mrs Wallis the defendant. Nevertheless, the plaintiff's counsel insisted, that the point, whether a good publication or not, should be reserved for a case to be argued above.—But the matter was compromised, on the defendant's remitting the costs.

Note, the case of *Peate and Ougley* was, where the testator produced to the witnesses a paper folded up; and desired them to set their hands to it as witnesses, which they all did in his presence, but they did not see any of the writing, nor did he tell them it was his will, or say what it was; but it was all written by the testator's own hand. It was objected, that this was not a good execution of the will within the statute; for it is not sufficient that the witnesses write their names in the presence of the testator, without any thing more; but they must attest every thing, to wit, the signing of the testator, or at least the publication of his will: But here the testator neither signed the will in their presence, nor declared it to be his last will before them. On the other part, it was insisted, that the execution was sufficient within the statute; for there is no necessity that the witnesses see the testator write his name; and if he writes these words, *signed, sealed, and published* as his will, and prays the witnesses to subscribe their names to that, it will be a sufficient publication of his will, tho' the witnesses do not hear him declare it to be his will. And Trevor chief justice inclined, that here was sufficient evidence of the execution, and the jury found it accordingly. But as to the matter of law, he permitted it to be found special. And it doth not appear further what became of it.

The case of *Trimmer and Jackson* was, where the witnesses were deceived by the testator at the time of the execution, and were led to believe from the words used by the testator at the execution of the instrument that it was a deed and not a will. It was delivered as his act and deed; and the words "*sealed and delivered*" were put above the place where the witnesses were to subscribe their names. And it was adjudged by the court, as it is said, for the inconveniences that might arise in families, from having it known that a person had made his will, that this was a sufficient execution.

12. The intention of the testator is called by lord *Coke* the pole star, to guide the judges in the exposition of wills.

Wills to be construed favourably.

And altho' by the law the intention is more to be considered than the words; yet such intention must be collected out of the words, and it must consist with the law. *Swin. 10.*

Thus, in the lord *Cheiney's* case, *M. 33 & 34 El.* Sir Thomas Cheiney, knight, lord warden of the cinque ports, made his will in writing, and thereby devised to Henry his son divers manors and to the heirs of his body, the remainder to Thomas Cheiney of Woodley and to the heirs male of his body, upon condition *that he or they or any of them shall not aliene or discontinue.* And the question was in the court of wards, between Sir Thomas Perot heir general to the lord warden and divers purchasers of Sir Thomas Cheiney, whether the said Sir Thomas Perot shall be received to prove by witnesses, that it was the intent and meaning of the deviser, to include his son and heir within these words of the condition [*he or they*], and not only to restrain to Thomas Cheiney of Woodley and his heirs male of his body. But Wrey and Anderson chief justices, upon conference had with the other justices, resolved that he shall not be received to such averment out of the will; for a will concerning lands ought to be in writing, and not by any averment out of it; for it will be full of great inconvenience, if none shall know by the written words of a will what construction to make, or what advice to give, but the same shall be controuled by collateral averments out of the will. But if a man hath two sons, both baptized by the name of John, and thinking that the elder (who hath been long absent) is dead, deviseth his land by will in writing to his son John generally, and in truth the elder is living; in this case the younger John may in pleading or in evidence alledge the devise to him, and if this be denied, he may produce witnesses to prove the intent of his father, that he thought the other to be dead, or that at the time of making the will he named his son John the younger, and the writer omitted the addition of the younger: and in this case no inconvenience can arise; for he who shall see the will by which the land is devised to his son John, cannot be deceived by any secret invisible averment, for when he shall see the devise to his son John, he ought at his peril to inquire what John the testator intended, which may easily be known by him who writ the will, and others who were privy to the intention; and if no direct proof can be made of the intention, then the devise is void for the uncertainty. *5 Co. 68.*

But this rule hath received a distinction of late, which hath greatly prevailed, between evidence offered to a court, and evidence offered to a jury. For in the last case, no parol evidence is to be admitted, lest the jury should be inveigled by it; but in the first case it can do no hurt, being to inform the conscience of the court, who cannot be byassed or prejudiced by it. And accordingly, in divers instances, collateral evidence hath been admitted in the court of chancery, to explain the testator's intention. *Law of test. 306. 2 Bac. Abr. 309.*

And in the case of *Selwin and Brown, M. 1734.* Lord Talbot admitted, that it had sometimes been allowed. *Cas. Talb. 240.*

But notwithstanding these cases, the courts have been very unwilling to admit of parol evidence in relation to any thing that appears on the face of

of a will; and it is certain that too much caution cannot well be used in this particular, especially when it is considered that the statute of frauds and perjuries, which was made to prevent perjury, contrariety of evidence, and uncertainty, binds the courts of equity as well as the common law courts; as also that little regard ought in many cases to be had to the expressions of the testator, either before or after the making his will, because possibly these expressions might be used by him, on purpose to conceal or disguise what he was doing, or to keep the family quiet, or for other secret motives and inducements which cannot after his death be found out. 2 *Bac. Abr.* 310.

And in the case of *Lowfield and Stoneham*, M. 20 G. 2. Upon plene administravit pleaded, the question was, whether 1000l received by the defendant was due to her in her own right, or as executrix of her husband, and consequently assets. And it arose upon the following devise: "I give to my loving brother John Stoneham 1000l, and in case of his death, to his wife Susanna," (who was the defendant.) It appeared that John Stoneham survived the testator. And therefore the plaintiff insisted, this legacy (which the defendant admitted that she had received) vested absolutely in him, and was assets in her hands. On the part of the defendant, it was offered to give in evidence, that the testator in extremis declared, he meant only to give his brother the interest of the 1000l, and that the defendant should have the principal in case she survived him. This parol evidence was opposed by the plaintiff's counsel, as being contradictory to the plain words of the will. And Lee chief justice said, it could not be allowed; and that in the case of *Selwin and Brown* (afore-said), the house of lords had refused it, even where it was to support the legal interpretation of the will; and lord Hardwicke, about two years ago, held it in the same manner in the case of the earl of *Inchiquin* and *Obrian*. Str. 1261.

And notwithstanding that wills are generally favoured by the law; yet where the testator endeavours to establish a settlement against the reason and policy of the common law, the judges will reject it. *Gilb.* 110. 2 *Bac. Abr.* 79.

Also where the testator by his will maketh no other disposition of his estate than the law it self would have done, had he been silent; there such a will is useless, and shall be rejected: and therefore if a devise be made to a person and his heirs, which person is heir at law to the deviser; this is a void devise, and the heir shall take by descent as his better title; for the descent strengthens his title, by taking away the entry of such as may possibly have right to the estate; whereas if he claims by devise, he is in as by purchase. *Gilb.* 110. 2 *Bac. Abr.* 79.

Also devises are void and rejected, where the words of the will are so general and uncertain, that the testator's meaning cannot be collected from them; and therefore where a man by will gave *all* to his mother, the general words did carry no *lands* to his mother; for since the heir at law hath a plain and uncontroverted title, unless the ancestor disinherits him, it would be severe and unreasonable to set him aside, unless such intention of the testator is evident from the will; for that were to set up
and

and prefer a dark and at best but a doubtful title, to a clear and certain one. *Gilb. 112. 2 Bac. Abr. 81.*

Clause of perfect mind and memory.

13. The clause of *perfect mind and memory* is more usual than necessary in a will; and yet not hurtful. *Swin. 77.*

What words will pass a fee simple.

14. A devise made *in fee simple*, without express words of heirs, is good in fee simple: But if a devise be made to *A B*, he shall have the land but for term of life; for these words will carry no greater estate. *Terms of the Law Tit. Devise.*

If lands be devised to a man, to have to him *for ever*, or to have to him and his assigns; in these two cases, the devisee shall have a fee simple: but if it be given by feoffment in such manner, he hath but an estate for term of life. *id.*

If a man devise his land to another; to give, sell, or *do therewith at his pleasure* or will: this is fee simple. *id.*

A devise made to one and to his *heirs male*, doth make an estate tail: but if such words be put in a deed of feoffment, it shall be taken for fee simple; because it doth not appear of what body the heirs male shall be begotten. *id.*

If lands be given by deed to one, and to the *heirs male of his body*, who hath issue a daughter, who hath issue a son, and dies; there the land shall return to the donor, and the son of the daughter shall not have it, because he cannot convey himself by heirs male, for his mother is a lett thereto: but otherwise it is of such a devise; for there the son of the daughter shall have it rather than the will shall be void. *id.*

If lands be given by deed to one and *his heirs for ever*, and if he die *without heirs* then to his brothers or sisters, this last is void, because the first gift conveyeth unto him the fee simple; but in a will, such devise over is good, and such limitation shall convey but an estate tail: As in the case of *Tyte and Willis, M. 7 G. 2.* The testator devised his lands to his wife *Jane* for life, remainder to his son *Henry* for life, remainder to his son *George and his heirs for ever*; and if he died *without heirs*, then to his two daughters *Katherine and Jane*. The question was, whether *George* took a fee simple, or only an estate tail. And the case of *Webb and Herring, Cro. Ja. 415.* was cited, to prove that where a devise is to one and his heirs, and if he die without heirs, remainder over to another, who is or may be the devisor's heir at law, such limitation shall be good, and the first limitation construed an intail, and not a fee, in order to let in the remainder man; but where the second limitation is to a stranger, it is merely void, and the first limitation is a fee simple. And by the lord chancellor: In this case, *George* took an estate tail. The difference which hath been taken is right; and the reason of it is, that in the latter case there is no intent appearing to make the words carry any other sense than what they import at law; but in the former, it is impossible that the devisee should die without an heir, while the remainder man or his issue continue. And therefore the generality of the word *heirs* shall be restrained to heirs of the body; since the testator could not but know, that the devisee could not die without an heir while the remainder man or any of his issue continued. *Cas. Talb. 1.*

If

If one devise to an *infant in his mother's womb*, it is a good devise; but otherwise by feoffment, grant, or gift: for in those cases there ought to be one of ability to take presently, or otherwise it is void. *Terms of the law.*

If one devise to a person by his will *all his lands and tenements*; here not only all those lands that he hath in possession do pass, but all those that he hath in *reversion*, by virtue of the word *tenements*. *id.*

If a man hath lands in fee, and lands for years, and deviseth *all his lands and tenements*; the fee simple lands pass only, and not the lease for years: but if a man hath a lease for years, and no fee simple, and deviseth all his lands and tenements; the lease for years passeth, otherwise the will would be merely void. *Cro. Car. 293.*

If a man seized of freehold lands, and of the legal estate of *copyhold* lands, makes a general devise of all his manors, messuages, lands, tenements, and hereditaments, but makes no *surrender of the copyhold lands to the use of his will*; the copyhold lands will not pass. By lord Hardwicke, in the case of *Gibson and Styles*, July 18. 1741.

The words (all my *lands*) in a devise, will pass a *house*; but the devise of a house doth not pass lands. *Mo. 359.*

A devise of a *messuage*, will carry with it a garden and curtelage; otherwise of a *house*, unless it be *with the appurtenances*. 2 Cha. Ca. 27.

The testator devised a house *with the appurtenances*. The question was, whether land in a field passed. And it was adjudged, that the land did pass; for it was in a will, in which the intent of the deviser shall be observed. *Godb. 40.*

But in a like case, where it appeared upon evidence, that the house was copyhold, and the land freehold; it was adjudged, that the land could not in that case be said to be appurtenant, altho' it had been used with it. *Cro. Eliz. 704.*

A devise of the *inheritance*, hath been held to be a devise of the lands. *Sty. 308.*

If lands are devised to trustees, without the word *heirs*; yet by implication they must have an estate of inheritance sufficient to support the trust: for there is no difference between a devise to a man for ever, and to a man upon trusts which may continue for ever. 1 Abr. Cas. Eq. 176.

If lands are devised to a man, *paying several sums* in gross; he hath a fee, tho' all the sums together do not amount to the annual rent of the land: for the devise shall be intended for his benefit; and if he had only an estate for life, he might die before he received the legacies out of the land, and consequently be a loser. *Id.*

So if lands are devised to a man, in consideration that he *release a sum of money* due to him; he has a fee simple, on his release of the debt: for the devise being intended for his benefit, an estate for life might be determined before he could receive the sum out of the land. *Id. 177.*

But if lands are devised to a man, paying so much out of the *profits* of the lands; he takes but an estate for life; for altho' he takes the land charged, yet he is to pay no farther than he receives, and so can be no loser. *Id.*

A man devised that his lands should descend to his son, but he willed, that *his wife should take the profits thereof until the full age of his son for his education and bringing up*, and died. The wife married another husband, and died before the full age of the son. And it was the opinion of Wray and Southcote justices, that the second husband should not have the profits of the lands until the full age of the son; for nothing is devised to the wife but a trust, and she is as guardian or bailiff for the benefit of the infant, which by her death is determined; and the same trust cannot be transferred to the husband: but otherwise, if he had devised *the profits of the land unto his wife until the age of the infant, to bring him up and educate him*; for that is a devise of the land it self. 2 Leon. 221.

Devise to a
feme covert,
to her separate
use.

15. H. 1724. *Rollfe and Budder*. Devise of a bond by the son to his mother to her sole and separate use: It is her sole property in equity, and her assignment of it is good. *Bunb.* 187.

So in the case of *Bennet and Davis*, M. 1725. A person seized of an estate in fee, devised it to the defendant's wife, who was his daughter, for her separate use, without any limitation to trustees: It was adjudged, that the husband was but a trustee for the wife. 3 P. Will. 316.

Devise to
heirs female.

16. If a devise be to a man, and to the heirs female of his body begotten; and after, the devisee hath issue a son and daughter, and dieth: here the daughter shall have the land, and not the son, and yet he is the most worthy person, and heir to his father. But because the will of the dead is, that the daughter should have it, law and conscience will so too. *Terms of the law*. Devise.

Devise to
one's relations.

17. A man devised his personal estate *for the use of his relations*, without specifying any in particular, or using any other words; and made an executor; and died. His mother and three sisters brought their bill, as nearest relations, for a discovery and account of the personal estate, and to come in according to the statutes for distribution. And it was agreed to be the rule, in construction of such devises to relations, that those who would by the statutes for distribution be intitled to the personal estate, in case the testator had died intestate, should, upon such general devises, be admitted in the same proportion only. And the lord chancellor Cowper said, he thought it the best measure for setting bounds to such general words, and that it had been often ruled accordingly in that court. *Roach and Hammond*, E. 1715. *Prec. Cha.* 401. 2 *Abr. Eq. Cas.* 438.

For if upon such general devise they were not to take in this manner, it would be uncertain; for the relations may be infinite. And in the case of *Carr and Bedford*, 30 C. 2. where the testator devised the residue of his estate *among his kindred according to their most need*; it was determined that this shall be construed according to the statute of distribution. 2 *Cha. Rep.* 146. 2 *Abr. Eq. Cas.* 365.

So in the case of *Thomas and Hole*, M. 1734. A man devised 500l to the relations of A, to be divided equally between them. A had, at the testator's death, two brothers living, and several nephews and nieces by another brother. It was determined, that no relations should take by this description, that could not take by the statute of distribution. *Caf. Talb.* 251.

Whether

Whether the *wife* is a relation in this respect, hath been made a question. As in the case of *Davis and Baily*, Feb. 8. 1747. The testator by his will gave the residue of his personal estate to his wife for life, remainder to such of his relations as would have been intitled by the statute in case he had died intestate. The wife claimed a moiety. By the lord chancellor Hardwicke: Relation here means kindred. The wife is not of kindred, nor a relation within the meaning of the statute.

And more particularly, in the case of *Worsley and Johnson*, M. 27 G. 2. The testator, seised in fee, deviseth his estate to his wife for life, remainder to another in tail, and for want of issue the reversion in fee to be sold; with these words, *And my mind is, that the money arising from the sale be divided amongst such of my relations, and in such manner, as the statute of distributions directs*: Then he gave other legacies to his wife, and appointed her sole executrix; and died; leaving relations of his own blood, and his said wife, who married a second husband. Then the wife dies; and the second husband dies; and the tenant in tail dies without issue. The plaintiff brings his bill, as executor to the second husband, praying a sale of the estate, and a moiety of the money thence arising, as the representative of the second husband to the wife who was intitled to it by the will, as a relation within the statute of distribution.—Lord chancellor Hardwicke: During the course of this cause, I have altered my opinion. The question arises on the words of the will referring to the statute of distribution, and depends upon the construction, which must be agreeable to the words, and to the intent of the testator to be from thence collected. The question is, what is the sense of the word *relation*, as used in this will. In a proper grammatical sense, it denotes a quality in the abstract; but in common sense, it becomes personal, and signifies the same as *my kindred*. Now *next of kindred* are the words in the statute to which he refers, and takes in only relations by consanguinity or by blood. Now it seems strange to say, that a man's wife is no relation to him; but she certainly is not in this sense, neither by blood nor affinity. The etymologists, when they speak of *consanguinity*, say, that it is *vinculum personarum ab eodem stipite descendendum*; and of *affinity*, they say, *uxor non est affinis, sed causa affinitatis*. And so the word appears to be used in our statutes: for if the wife was of kin to her husband, she would exclude all the rest, as being the nearest of kin. So in the 21 H. 8. c. 5. the ordinary shall grant administration to the widow, or next of kin; which distinguishes the wife from the kindred. This perhaps would be too nice a construction of the will, unless the manifest intent of the testator would warrant it; for wills are to be construed according to common understanding, and not by nice grammatical distinctions. Now in this will he has made an ample provision for the wife; and whenever he gives her an interest, he expressly mentions her. It was probable that this remote contingency would not happen in her life; and he could never intend, that her representative, such as the executor of a second husband, should carry so considerable a share from his own blood. Suppose he had said, *my own relations*; he would certainly be construed to mean his relations by blood. Therefore in this strict sense of the words, the wife is not in-

titled to any share. And I continue in the same opinion I was of, in the case of *Davis and Bailey*; which is expressly to this point. And therefore I dismiss the bill; but without costs.

Devise to
younger chil-
dren.

18. If money be devised to younger children, where there are divers daughters and a son, and the son is by birth a younger child, but heir at law to the inheritance; the son shall not be considered as a younger child, so as to take by the devise. 1 *Abr. Eq. Cas.* 202. *Bretton and Bretton*, 12 C. 2.

In the case of *Becke and Becke*, H. 1713. The testator, being tenant in tail, had power by deed or will to charge the lands with 2000l, for portions for younger children, living at his death. He had only two daughters, and the younger was born after his death. He charged the lands by his will for raising this 2000l. And the question was, whether it should be raised. It was objected, that the elder daughter was not intitled to any part of it, because it was only to go to the younger children; and the younger daughter cannot claim any part of it, because she was not living at the time of his death. But by the lord chancellor Harcourt: The eldest daughter, tho' first born, when there is a son, hath been often ruled to be a younger child. Every one but the heir is a younger child in equity; and the provision which such daughter will have is but as a younger child's, in regard the son goes away with the land as heir: so here, the estate goes all to the remainder man, who is *heres factus*, and neither of the two daughters is heir. And as to the younger daughter, he said, it would be very hard in a court of equity, that a child, because it happened not to be born at such a time, must therefore be unprovided for; but the law so far regards an infant *in ventre sa mere*, as in this respect to look upon it as living at the time of the father's death. 1 *P. Will.* 244.

Life's estate,
how implied.

19. If one will that his son shall have his land after the death of his wife; here the wife of the devisor shall have the land first for term of life. So likewise if a man devise his goods to his wife, and that after the decease of his wife his son and heir shall have the house where the goods are; there the son shall not have the house during the life of the wife: for it doth appear that his intent was, that his wife should have the house also for her life, notwithstanding it were not devised to her by express words. *id.*

Estate equally
to be divided.

20. In the case of *Rigden and Valier*, Mar. 25. 1751. The question arose on a deed poll, which began in this manner, "To all christian people, &c. I *George Everenden*, in consideration of natural love and affection &c. and for the firm settling and assuring of all my real and personal estate on my wife and children after my decease, dispose thereof in the manner following; I give, grant, and confirm to my daughter *Margaret*, &c. [This was not in question.] Also, I give, grant, and confirm to my two daughters *Margaret* and *Hannah* the rents and profits of the lands called *W.* during the life of my wife, equally to be divided betwixt my said daughters, paying to my wife ——— per annum; and after her decease to them and their heirs, equally to be divided betwixt them. Also, I give, grant, and confirm to my five daughters

"ters

"ters all my personal estate equally to be divided betwixt them, after
 "all my debts and funeral charges paid and satisfied." This deed was
 signed and sealed by *George Everenden* in the presence of three witnesses.
 He and his wife died. *Hannah*, one of the daughters, married *Rigden*,
 by whom she had the plaintiffs, and died. The question was, whether
Margaret and *Hannah* took as jointenants, or as tenants in common. If
 the latter; the plaintiffs, who brought their bill for an account of the
 rents and profits of a moiety of the estate given to *Margaret* and their
 mother *Hannah*, and claimed as co-heirs of *Hannah*, were right: If the
 former; the whole survived to the defendant *Margaret*, as the survivor of
 her sister.——By the lord chancellor *Hardwicke*: This case depends
 upon a deed or writing, which, tho' executed as a deed, I am not sure
 was intended to take effect as such. It begins as a deed poll; but it is a
 disposition of the whole real and personal estate of *Everenden*, and to take
 place from his decease, and in consideration of the natural love and affec-
 tion he bore to his wife and children. If it be not construed as a will, or
 covenant to stand seised, (and being in consideration of natural love and
 affection, tho' by a single deed without livery, it may be considered to be
 a covenant to stand seised,) it will be void, being without livery, and
 because a freehold cannot pass *in futuro*. But by way of covenant to
 stand seised, it may be good; for that operates not by transmutation of
 the possession, but the use remains in the grantor till taken out of him by
 force of the consideration. The present question arises upon a very liti-
 gated point in the books, tho' clear enough in one view. In a *will*, the
 words *equally to be divided* certainly create a tenancy in common, tho' this at
 first was doubted; nay the words *equally*, or *share and share alike*, have the
 same effect. But it is said, that there is not sufficient authority to establish
 these words to make a tenancy in common in a *deed*, and that the books
 take the law to be otherwise. 'Tis true, the books do so generally. And
 yet there is no solemn determination that I can find, where it has been
 adjudged against a title, that the words *equally to be divided* will not cre-
 ate a tenancy in common in a deed. The only determination that hath
 been, was in the case of *Fisher and Wig* (L. Raym. 623. 1 P. Will. 14.)
 which hath been relied on as a judgment of the court of king's bench,
 that these words make tenancy in common in a deed. But it is objected,
 that this is a case of doubtful authority, being on the opinion of only two
 judges, against so great a man as lord chief justice *Holt*; and it is appre-
 hended too, that this judgment was afterwards reversed. I have made
 inquiry, and cannot find that it was, or that even a writ of error was
 brought: so that this judgment yet stands, and is so far an authority,
 that this construction, in regard to the words *equally to be divided* making
 a tenancy in common, took place in the case of the surrender of the co-
 pyhold lands.——Another case has been cited at the bar, which, if
 rightly reported, is in point, 2 Vent. 361. But I have caused the regis-
 ter's books to be searched, and can find no decree to warrant the report:
 but notwithstanding this, there might have been such a case, and it is
 taken by *Gould* that there was.——Another case is mentioned at the
 end of *Fisher and Wig*, by *Northey*; but the records have been searched,

and there is no possibility of finding it. — *Smith* and *Johnson* too is another authority, such as it is. — In regard to the case before me, upon the best consideration I can give it, I am inclined to be of opinion, that the deed or instrument, call it what you will, has created a tenancy in common; and that to say otherwise, would be a manifest contradiction to the intention of a father providing for his children. Tho' none has a greater reverence for the opinion of lord chief justice *Holt* than I have, I think the arguments of the other judges are founded more on the reason and nature of the thing than his lordship's; and that his proceed from the artificial and refined reasoning of the law, and are deduced from a great deal of fine learning drawn from arguments in other cases. The arguments of Mr justice *Gould* have great weight, and are by no means satisfactorily answered. Indeed that case was on a surrender of copyhold lands in the lord's court; and the two judges argued it was not to be considered with great strictness, but as a will: whereas *Holt* contended that it should be construed as a deed; and in one thing he is certainly right, that the surrender of copyhold lands to uses is not to be considered on the foot of uses, being not within the statute of uses; and therefore such a surrender is only a direction of the lord whom to admit; and when admitted, the surrenderee is not in by the grant of the lord, but by the surrender. If the arguments of the judges had any weight in that case, they must have full as much in this, being on a covenant to stand seised. But it is objected, that there is no warrant to construe a deed to uses, as to the limitations and words of it, with greater latitude than a conveyance by way feoffment, or any other conveyance at common law; and that strange confusion would arise, if the words of a deed on the statute of uses should be taken in a larger sense than they would bear in a conveyance at common law. This is true in general: for the statute joining the estate to the use, it becomes one intire conveyance by force of the statute. But some restriction must be added to this. The words of limitation, to be sure, must be construed in the same sense as at common law. But when there are words of regulation or modification of the estate (as the words *equally to be divided* are), and not words of limitation; I think there is no more harm in giving them a greater latitude in deeds on the statute of uses, which are trusts at common law, than in feoffments, which at all times have been strict conveyances. The case upon that occasion cited by *Gould*, is very material; where the intendment, not the words, of the special verdict influenced the determination. Consider the argument from thence to the present case. The only distinction taken between the construction of words in a special verdict and in other cases is, that in a special verdict, they may be taken more largely than in pleading; and therefore it is often said, that a description, which would be bad in a count or plea, may be good in a verdict, and taken by the intendment of the jury: but there never was any book that said, that words may be taken more loosely in a special verdict than in a deed. It is admitted, that if the deed had been in this manner, to hold one moiety to one and her heirs, and the other moiety to the other and her heirs, this had been good, not only in such a deed as this, but likewise in a feoffment. And considering how the

the sense of the words *equally to be divided* is to be construed, there is no reasonable difference between the two cases. Thus the matter stands on the foot and authority of *Fisher* and *Wig*.—But there are other reasons which greatly strengthen the present case in favour of the plaintiffs. The first is this: Here is a parent making a provision for his children (who were five in number), and for his wife: if the children were to take this estate intended for the support of each of them and their future families, as jointenants; the share of any one, who should happen to die, would not descend for the maintenance of his children and posterity, but survive to the other jointenants; a disposition by no means reasonable, nor likely to be supposed agreeable to the intention of the father. And this court has always used a great latitude in pursuing the intent of the parties, in construing a deed to make a tenancy in common or a jointenancy, tho' the words *equally to be divided* have been omitted; and have determined therefore, that if two men jointly and equally advance a sum of money on a mortgage in fee, and take a security to them and their heirs, there shall be no survivorship; and so if they foreclose an estate, it shall be divided betwixt them, because their intention is supposed to be so. It has been said indeed, if two men make a purchase, they may be supposed to buy a kind of chance between them, and to intend that the survivor shall be intitled to the whole. But it has been determined, that if two purchase, and one advance more than the other; there shall be no survivorship, tho' there be no such words as *equally to be divided*, or to hold as tenants in common: which shews, how strongly the courts have leaned against survivorship, and erected a tenancy in common, by construction, or the intention of the parties. Consider how nearly this comes to the case in question. And this court always considers provisions for children, as having an equitable consideration. And therefore, tho' such voluntary dispositions cannot be preferred to debts for valuable consideration; yet they are always preferred to other voluntary dispositions.—But *Geo. Everenden* has himself put his own construction on the words, by the disposition of his *personal* estate; which is allowed to make a tenancy in common.—Besides, this appears to be as near a testamentary act as possible; nor do I know why it may not be proved as a will, notwithstanding the solemnity of the execution by sealing and delivery: according to the case of *Kibbet and Lee*, (*Hob.* 313.) and a late determination in the king's bench in the case of *Trimmer and Jackson*. And it is admitted, that in a will, these words make a tenancy in common; and I think it ought to be so here. My opinion therefore at present is, that, agreeable to the case of *Fisher* and *Wig*, strengthened by the farther observations already made, the plaintiffs are intitled to a division of the estate.

So in the case of *Goodtitle and Stoakes*, in the king's bench: H. 27 G. 2. By indentures of lease and release, dated in the year 1695, and made between *John Guise* and his wife of the one part, and *William Purefoy* and *Peter Capper* of the other part, the said *John Guise* granted and released to the said *Purefoy* and *Capper* and their heirs, the lands in question, to the use of such and so many of the children of the said *Guise*, on the body of his said wife begotten, in such manner, and in such shares, as the said

said *John Guise* should appoint; and in default of such appointment, *to the use of all such children equally to be divided*: with a remainder to the right heirs of the said *John Guise*.—*John Guise* died, without making any appointment, leaving his widow, and children *Richard, Jane, Peter, and Wilmot*.—The question was, whether by the words “*to the use of all such children equally to be divided*” the children took as tenants in common, or as jointenants, in which case *Wilmot* who married the defendant, being the only surviving child, would take the whole.—*Lee Ch. J.* delivered the opinion of the court: This case depends upon the clause (abovementioned). The defendants have insisted, they ought to take as joint tenants. Joint tenants must be to the land in one right, and by one joint title, and they must have one joint freehold. Tenants in common take differently, as is laid down, 1 *Inst. sect.* 292, 296, 297. from which it does appear, that no particular words are necessary to create a tenancy in common. The question then comes to this; Whether the children do not take several freeholds, with a several occupation? To make them tenants in common, would be to construe every word in this deed as operative. No words in a devise or a grant shall be construed void, if they can be construed otherwise consistently. (3 *Lev.* 373.) There is no doubt at this time of day, but that the words *equally to be divided*, in a will, make a tenancy in common. In the case *Cro. Eliz.* 443, 695. it was first determined to be so. There is no determination where in a deed to uses they will. It has been objected, they have a joint title in the freehold; and the words *equally to be divided* will not sever it: And tho’ the statute of uses executes the use to the possession; yet it leaves the estate subject to the same uses: The intent cannot prevail here; and these words, in a conveyance at common law, would not create a tenancy in common. But the question here is not, whether the joint title is severed; but, whether any joint title is conveyed. If land be given to *A. and B.* to hold one moiety to *A.* and his heirs, and the other moiety to *B.* and his heirs; they take as tenants in common. And where the grantor, in the same clause, and *uno flatu*, uses the words *equally to be divided*; he intends to convey an equal property in the land, and to the fee, to each. This is the opinion of *Popham, Cro. Eliz.* 696. in his argument. I cannot think the clause here is nugatory, or of no effect. The intent of the party operates to pass the whole fee. There is no rule in law, to prevent the court from making a construction, according to the intent of the party, in a deed. The true reason, why the words *equally to be divided* make a tenancy in common, is from the apparent intent that the estate should be divided: And such a construction ought to be made, if there be no rule to the contrary; and no precise words are necessary. The case in 2 *Ventr.* 365. is in point: A covenant to stand seised to the use of *A.* for life; and after, to two equally to be divided. 1 *Inst.* 191. a. If a verdict find that a man hath two parts of a manor, or the like, to be divided into three parts; they are tenants in common, by the intendment of the verdict; And if in a verdict, there is no reason why not in a deed. *Carth.* 343. *Leigh v. Brace.* A conveyance by way of use shall be construed as a will, with respect to the intention of the parties. The case of *Fisher and Wig* cannot

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cannot now be departed from: It is mentioned in the case of *Philips* and *Stringer*, as if this judgment had been reversed; but it was not. The whole reasoning of *Holt's* argument, in the said case of *Fisher* and *Wig*, is applied to the supposition of a conveyance at common law: but it does not from that appear, what his opinion would have been, upon a direct deed to uses as here. In the case of *Rigden* and *Valier*, lord *Hardwicke* Ch. J. declared, upon the best consideration he could give the case, that he was inclined to think, that the words *equally to be divided*, whether in a will or deed, create a tenancy in common.——And judgment was given for the plaintiff by the whole court.

21. A devise of all a man's goods and mortgages to his executors, is a good devise, and will pass all the lands mortgaged; for the equity of redemption passeth to the devisee. *God. O. L.* 477. *Cro. Car.* 37. Devise of mortgages, pass th the lands.

But by a general devise of all lands tenements and hereditaments, mortgages in fee (tho' forfeited) will not pass; nor will they pass by such a general devise, tho' the equity of redemption is after the making of the will foreclosed or released. *2 Bac. Abr.* 83.

22. By the word *lands*, an advowson will not pass; but by *hereditaments* it may. *Fortesc.* 351. Advowson, tithes, fee farm rents.

But fee farm rents, portions of tithes, or any other right out of lands, will pass by a devise of lands. *Viner.* Devise. K.

23. Where lands are appointed to be sold, and it is not said by whom; the executor ought to sell, because he is the person intrusted with the execution of the will. *Law of Test.* 121. *Law of Ex.* 221. Lands to be sold.

H. 26 El. Vincent and Lee. A special verdict was found, that *A* was seised of certain lands in fee, and devised the same in tail, and if the donee died without issue, that his said lands should *be sold by his sons in law*, he in truth having five sons in law; one of his sons in law died in the life of the donee, and after the donee dieth without issue, and then the four of the sons in law sold the land: and it was adjudged, that the sale was good; because they were named generally by his sons in law, and the lands could not be sold by them all; and the words of the will, in a benign interpretation, are satisfied in the plural number, albeit they had but a bare authority. But if they had been particularly named, it had been otherwise. *1 Inst.* 113.

But if a man deviseth lands *to his executors to be sold*, and maketh two executors, and the one dieth; yet the survivor may sell the land, because as the estate, so the trust shall survive. And so note a diversity between a bare trust, and trust coupled with an interest. *1 Inst.* 113.

Yet in neither of those cases, albeit one refuse, can the other make sale to him that refused; because he is party and privy to the last will, and remaineth executor still. *1 Inst.* 113.

And hereupon lord Coke says, his advice to them that make such devises by will, in order to make it as certain as they can, is, that the sale be made by his executors or the survivors or survivor of them, if his meaning be so, or by such or so many of them as take upon them the probate of his will, or the like. And it is better to give them an authority than an estate, unless his meaning be they should take the profits

fits of his lands in the mean time, and then it is necessary that he devise, that the mean profits till the sale shall be assets in their hands; for otherwise they shall not be so. 1 *Inst.* 113.

For where the testator deviseth that his *executors shall sell his land*, there the land descendeth in the mean time to the heir; and until the sale be made, the heir may enter and take the profits. But when the land is devised *to his executor to be sold*, there the devise taketh away the descent, and vesteth the estate of the land in the executor, and he may enter and take the profits, and make sale according to the devise. And in such case, the executor is bound to sell so soon as he can; for that the mean profits taken before the sale shall not be assets; and therefore he might otherwise take advantage of his own laches. 1 *Inst.* 236.

Where there is a devise of lands to trustees to sell, to pay debts; the heir shall have the surplus. *Law of Test.* 114.

For whatever interest in, or profits out of a real estate, are undisposed of by a testator, the same shall descend to the heir; and he takes them, not by the will, or the intent of the testator, but they are thrown upon him by the law, for want of some other person to take. *Caf. Talb.* 44.

Thus, the testator by will devised all his lands to trustees to sell, and dispose of the money as he by writing should appoint; and for want of such appointment, to his four nephews. The testator by writing appoints his trustees to pay several sums to several persons, but not to near the value of the land. It was held, that the nephews should not have the residue, but that the heir at law should have it, as an interest resulting, and not disposed of. *City of London and Garway.* 2 *Vern.* 571.

A person devised his real estate to his executors, to be sold for payment of debts; the surplus, if any be, to be deemed personal estate, and to go to his executors, to whom he gave 20 *l* a piece. It was decreed, that the surplus should be a trust for the heir at law: And the same was afterwards affirmed in parliament. *Countess of Bristol and Hungerford.* 2 *Vern.* 645.

The testator devised to his nephew several lands, to hold to him and his heirs for ever, in trust to be sold for payment of all his debts and legacies, within a year after his death, and made him executor, but gave him no legacy. It was held, that there was no resulting trust for the heir at law; for then the executor, who is taken notice of as his nephew, would have nothing for his trouble. *Cunningham and Mellish.* *Prec. Ch.* 31. 2 *Vern.* 247.

If lands be devised *for payment of debts*; the executor may sell tho' authority be not especially given him; but otherwise, if such devise had been for *legacies* only, or for raising portions, or the like; for in such case there had been no remedy but in chancery against the heir. 1 *Keb.* 14.

If lands be devised on trust, *out of the rents and profits* to pay debts and legacies; if the rents and profits will not raise it in a convenient time, the trustees may sell: for the words [*profits of lands*] especially when to pay debts or portions, imply any profits that the land will yield, either by selling or mortgaging. 1 *P. Will.* 415.

If lands be devised to be sold for payment of portions, and one of the children dies after the portion is due, and before the lands sold; the administrator of the child is intitled to the money. 1 Vern. 276.

For lands devised to be sold, or in trustees hands, for payment of debts, portions, or the like, are to be deemed as money so far as there are any such to be paid; and so money devised to buy lands, is to be deemed as lands. But with respect to the heir at law, or residuary legatee, the lands so given in trust, or devised for payment of debts or legacies, shall be deemed as land; and he may, by paying the debts or legacies pray a conveyance. 9 Mod. 170.

So if money be devised to be laid out in land, and settled on a man and his heirs; he may come into court, and pray to have the money, and that no purchase may be made; for no other has any interest in it. But if he die before it is paid or laid out in land, and the question is between the heir and executor who shall have it; the heir shall have it, and it shall be considered as land; first, because the heir in all cases is favoured; and secondly, if the executor should have it, it would be against the words of the will, which gave it to the heir. Prec. Cha.

544.
24. Devise of a rent charge to his younger son, *towards the education and bringing him up in learning*; it is not conditional, and he shall have the rent tho' not brought up in learning, and the words (*towards his education*) are only to shew the intent and consideration of the payment of the sum. 2 Lev. 154. Devise upon condition.

Devise of lands to his wife for life, remainder to his second son in fee; provided if his third son shall within three months after the wife's death pay 500l to the said second son his executors or administrators, then he devised them to the said third son and his heirs. The third son died, living the wife: Then the wife died. The heir of the said third son may enter upon the lands, upon payment or tender of the 500l. It is not a condition, but an executory devise. M. 5 G. Marks and Marks. 10 Mod. 420.

Note, *Executory* is said to be, where an estate in fee, created by deed or fine, is to be afterwards executed by entry, livery, writ, or the like. Estates *executed* are, when they pass presently to the person to whom conveyed, without any after act. And an *executory devise* is, where a future interest is devised, that vests not at the death of the testator, but depends on some contingency which must happen before it can vest. If a particular estate is limited, and the inheritance passeth out of the donor, this is a *contingent remainder*; but where the fee by a devise is vested in any person, and to be vested in another upon contingency, this is an *executory devise*. And in all cases of executory devises, the estates descend until the contingencies happen.

Devise, If my son and my two daughters die without issue of their bodies, then all my lands shall remain and come to my nephew and his heirs. Here no estate is devised to the son and daughters by implication; the words only import a designation or appointment of the time when the land shall come to the nephew, namely, when the son and two daughters

ters shall happen to die without issue, and not before. For no estate being created to the son and daughters, the nephew can take nothing by way of remainder; for that must descend to the heir at law. A remainder cannot depend upon an absolute fee simple, that being but the residue of an estate. For when all a man has of an estate or any thing else is given or gone away, nothing remains, and no other or further estate can be given or disposed, and therefore no remainder can be of an absolute fee simple. Yet, in another respect, an estate in fee may be devised to one, and to be in another upon a contingency, as default of paying a sum, or such a one's dying without issue living the other, or such like. *Vaugh.* 259. 270.

A man devised his lands to one, and devised also that the said devisee should pay a rent to *A*, and that *A* might distrain for it; and if the devisee fail of the payment of the rent, that the heirs of the deviser might enter. This is a good distress, and a good condition. *1 Lev.* 269.

Devise to his wife; proviso, and my will is, that she shall keep my house in good repair: This is a good condition. So a devise of lands to one, paying 10 l to another, is a good condition. *1 Lev.* 174.

Devise of 100 l to his wife, for and in discharge of her dower; is a condition, that she shall not have the 100 l, till she make a discharge of her dower. *Cro. Eliz.* 274.

If a man deviseth land to an executor to be sold; this amounts to a condition. *1 Inst.* 236.

The mortgagee by will remits part of the mortgage money and all the interest, *if the rest be paid* within three years. If the mortgagor doth not pay within three years, he loses the benefit of the bequest. *1 Cha. Ca.* 51.

If lands are devised in fee, upon condition that the devisee shall not alien; this condition is void: And so it is of a feoffment, grant, release, confirmation, or any other conveyance whereby a fee simple doth pass. For it is absurd and repugnant to reason, that he who hath no possibility to have the land revert to him, should restrain his feoffee in fee simple, of all his power to alien. And so it is, if a man be possessed of a lease for years, or of a horse, or of any other chattel real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same; this is void: because his whole interest and property is out of him, so as he hath no possibility of a reverter; and if such condition should be good, it would oust him of all the power which the law gives him, which would be against reason, and therefore such a condition is void. *1 Inst.* 223.

When the devise is to an infant, when he shall be born; or to a daughter, when she shall be married; it shall descend to the heir in the mean time. *1 Sid.* 153.

The testator, having the reversion of lands of which another was tenant for life, devised the lands to a man when he should marry his daughter. The tenant for life dies. The lands shall descend, until the devisee shall marry the daughter. *1 Keb.* 802.

If executors or others who are put in trust by devise to sell, or the like, will not perform the trust; the heir may enter. *Br. Devise. 46.*

A devise of lands was made, to the eldest daughter, paying 100 l to the second daughter, and 100 l to the third daughter; and if the eldest daughter did not pay the 100 l to the second daughter by such a day, then the testator devised the land to the second daughter, she paying her sister's portion by a certain day; and if she did not pay, then he devised the land to the third daughter. It was resolved, this was not in the nature of a mortgage, to be redeemable after the time of payment was over; but that the eldest daughter not paying at the time appointed, the second daughter should have the land, and the eldest had no relief. *2 Freem. 206.*

The testator devised lands to one, upon condition to pay 30000 l to his granddaughter and heir at law, to wit, 1000 l a year for the first sixteen years, and 2000 l a year after till the whole should be paid. Of which, 1000 l being in arrear, the heir enters. It was resolved by Cowper lord chancellor, that the devisee of the lands should be relieved upon paying the 1000 l with interest; the court declaring, that they would relieve wherever they could give satisfaction or compensation for the breach of the condition. *1 Salk. 156. 2 Vern. 594.*

Where the devisee, who is to perform the condition, is heir at law, notice of a condition must be given to him; because he having a title by descent, need not take notice of any will, unless it be signified to him: But where the devisee is a stranger, and not heir, he must inform himself of the estate devised to him, and upon what terms, and must take notice of the condition at his peril. *Cart. 94. 1 Ventr. 200.*

25. Devises, as well as other settlements, which tend to introduce perpetuity, are void; for wills, tho' favourably expounded, are yet to be construed according to the common rules of the courts of law and equity: Hence it is, that a devise to John and his heirs, the remainder to Thomas and his heirs, is void; for that the law in no case will allow a limitation of a fee simple upon a fee simple; because by a devise to John and his heirs, the deviser hath transferred the whole estate to him, and then the limitation over must be impertinent and void, when the deviser before had given the whole estate. Nor can his devise be good by way of future interest, or a remainder to vest upon a contingency; because no man can say when the heirs of John will fail: and to allow the remainder to Thomas to be good upon such a distant contingency, is to perpetuate the estate in the family of John, to preserve a remainder or interest in Thomas, which probably may never vest. *Gilb. 116. 2 Bac. Abr. 80.*

But tho' the law will not allow a present remainder to be limited upon a fee, yet a future contingent estate may be limited upon a fee, where the contingency upon which it is to vest, is to happen in a short time: And therefore if a devise be made to John and his heirs, and if he die without issue, living Thomas, then to Thomas and his heirs; there nothing vests immediately in Thomas, because the whole estate is transferred to John; yet the limitation is good by way of executory interest or devise; because it is to vest on a contingency which is to happen on a life in being, therefore

fore out of the inconvenience or danger of a perpetuity; because John is only tied up from alienating but for life, and his heirs are at liberty to dispose of it after the death of Thomas. *Gilb.* 116.

If a man devise a *personal* chattel to one, the remainder of it to another; the first devisee hath the whole property, and may dispose of it as he pleaseth: for such chattels will bear no limitation over, because being commonly moveable things, they are subject to be broken, worn out, or lost, in the compass of a life; and therefore it were ridiculous to suffer a limitation, which the nature of the thing will not bear. *Gilb.* 117.

But otherwise it is of a *real* chattel, as of an use: It was indeed formerly held, that such limitations of remainders of terms were void; but at length the court of chancery interposed, to rectify the rigour of the common law, and hath settled such remainders of terms to be good, where the settlement doth not tend to introduce perpetuity. *Gilb.* 118.

Therefore if a term be devised to John and the heirs male of his body, provided if John dies without issue in the life of Thomas, then the term to go to another; this last limitation is good, because there is no danger of a perpetuity, for the contingency on which it is to vest is to happen within a life in being. *Gilb.* 118.

But if the limitation had been to John in tail, and the remainder over to another; here the last limitation had been void, because the whole property of the term being in John, the limitation over, which is to vest on the contingency of John's dying without issue, is too distant to expect: whereas in the former case, the limitation after the intail to John is good by way of future interest or executory devise, because it is to vest in the compass of a life, or not at all; and it doth not look like a perpetuity to oblige John from alienating, because the estate will be free from the clog when the life is spent, and whoever is proprietor afterwards may dispose of it at pleasure. *Gilb.* 119.

E. 1731. Fereyes and Robertson. A man by his will deviseth his leasehold estate, and other his chattels real, to his son William and to the issue of his body; and if he die without issue, to his son B. and the issue of his body; and if he die without issue, to C, and so on. By the whole court, The whole interest vests in William, and shall go to his executors or administrators, and the limitations over are void. *Bunb.* 301.

But a lease assigned in trust for A for life, remainder to B for life, with remainder to twenty other persons all in being at the time, is good; because they are like candles all lighted at a time, and have an easy common probability of determination. *Law of Test.* 99.

So to A for life, remainder to his first issue for life, is good; because no vast uncertain distance of time. *Law of Test.* 99.

In general, it seemeth to be agreed, that where the devisee or grantee of a leasehold would be tenant in tail in case of a freehold, he shall have the whole interest in the leasehold, and all limitations over are void; but where he would be only tenant for life in case of a freehold, the limitation of the leasehold over will be good.

Money cannot be devised from one to another; as for instance, the testator had three daughters to whom he devised 540 l equally to be divided;

vided; and if any of them died without issue, her part to go to the survivor: one of them married and died without issue; the husband exhibited a bill against the executor and the surviving sisters for his wife's part, being 1801; and had a decree: because a sum of money cannot be intailed. 2 *Ventr.* 349.

But the *use* of chattels personal may be bequeathed to one for life; and after, the *property* to another: so that if one will that *A* shall enjoy the use of his household stuff during his life, and after that it shall remain to *B*; this is a good devise thereof to *B*. But if the *property* of the thing be bequeathed to the first of them, then it is otherwise: for the gift of a chattel personal, tho' but for an hour, is a gift thereof for ever; provided that the testator make it absolute, and not conditional. *Swin. a.* 207. 1 *P. Will.* 651.

A devise of goods to *A* for life, with remainder after the decease of *A* to *B*. It was said, to be now clearly settled, that it is a good devise to *B*, and that *B* may exhibit a bill against *A* to compel him to give security that the goods shall be forthcoming at his decease; and is all one whether the goods or *use* of the goods be devised for life. 2 *Freem.* 206.

M. 1696. *Hide and Parrot.* The testator bequeathed all his household goods to his wife for life, and after to his son: It is a good devise over, and the same as if the devise had been only of the use of them for her life. And by lord Somers: It is a rule, where personal chattels are devised for a limited time, it shall be intended the use of them only, and not the thing itself. 2 *Vern.* 331.

M. 1702. *Hale and Burrodale.* A farmer devised his stock, which consisted of corn, hay, cattle, and the like, to his wife for life, and after her death to the plaintiff. It was objected, that no remainder can be limited over of such chattels as these, because the use of them is to spend and consume them. But the master of the rolls said, the devise over was good; but said, if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useless, the defendant was only to answer the value of them at the time of sale. And an account was decreed to be taken accordingly. 1 *Abr. Cas. Eq.* 361.

T. 1720. *Upwell and Halscy.* The testator, being possessed of a personal estate of the value of 3331, having a wife and sister, but no issue, devised that such part of his estate as his wife should leave of her subsistence should return to his sister and the heirs of her body, and made his wife executrix. The wife married; and died, living her husband. The master of the rolls said, that it is now established, that personal things or money may be devised for life, and the remainder over; and that tho' it be true, that the wife had a power over the principal sum provided it had been necessary, yet not otherwise. And he directed, that the master should inquire how much had been applied for the wife's subsistence, and the husband to account for the residue. 1 *P. Will.* 651.

Where a man devises goods to go as heir-looms with such an estate, so far as by law they may; the court, to the end that the testator's intention may

Devise to
children yet
unborn.

may take effect, will decree a conveyance from him to whom they may come as personalty. *Barnard. Cha. Ca. 54.*

26. A devise to one's children and grandchildren generally, refers only to such children and grandchildren as were living at the time of making the will; but if a devise were to one's children and grandchildren living at the time of the death of the testator, a child *in ventre sa mere* might in such case be so far regarded, as to be looked upon as living. *1 P. Will. 342.*

For a devise to an infant *in ventre sa mere* is good; and the freehold shall descend in the mean time. *1 Roll's Abr. 609. 1 Lev. 135.*

So if a man devises lands to be sold, for the increase of childrens portions; a child born since the will shall have a share. *2 Cha. Rep. 211.*

So where a man conveyed a term for 500 years, upon trust to raise 1500l, for such child or children as he should have living at his death; and died, leaving no child, but his wife ensient of a daughter, which was after born: It was decreed, that this daughter was a child living at his death, within the meaning of the trust. And the direction of a trust is not so strictly construed as the limitation of an estate at law; and in *Luttrell's* case, in lord *Bridgman's* time, a bill was brought on behalf of an infant *in ventre sa mere* to stay waste, and an injunction was granted. *Hale and Hale. Prec. Cha. 50.*

T. 11 G. 2. Jones and Fulham. The testator, being possessed of a term, devised it in these words: "To my wife for her life; and after her death, to such child as my said wife is now supposed to be with child and ensient of, and his heirs for ever: Provided always, that if such child, as shall happen to be born as aforesaid, shall die before it has attained the age of 21 years, leaving no issue of its body; then the reversion of one third part to my said wife, and the other two thirds to my sisters." The testator dying within a month after, the wife entred, and enjoyed during her life, but had no child or miscarriage. And upon her death, the question was, Whether, as no child had ever been born, the remainders, limited upon his dying under 21 without issue, could take effect. And after several arguments, it was held by the court of king's bench, that they might; that tho' formerly there had been opinions to the contrary, yet according to the law now settled, the devise to the infant *in ventre sa mere* was well limited, and if any child had been born, would have passed the term accordingly: secondly, that tho' no child was ever born, yet the remainders are notwithstanding good; for there being no devisee, the devise, tho' void only *ex post facto*, falls to the ground as much as if it had been void in its creation, and this lets in the remainders immediately; that tho' the clause by which the remainders are limited is in words, strictly speaking, conditional, yet they do not make it a condition, but only a limitation. Lastly, that the contingencies must happen within a reasonable time; and therefore it may well operate by way of executory devise. And they said they had seen the decretal order in the court of chancery, by which it appeared, that the same question, arising upon this same will and concerning the same premises, came before lord Harcourt; and that he was of opinion, that the devise over of the reversion in thirds

to

to the wife and two sisters was good, notwithstanding the wife was not
consent with any child. *Vin. Devise. L. 53.*

27. The father settled a lease, with reference to his will; in which he
gave 500 l to each of his daughters, to be paid at the age of twenty-
one; and if any or all died before that age, then to others; but devised
no maintenance to them till their portions became payable: By the court,
A maintenance cannot be decreed, because of the devise over. 1 *Chan.*
Caf. 249. 3 Salk. 127.

In what case
maintenance
shall be im-
plied.

But if there is no devise over, the court will decree a maintenance in
the mean time: Thus in the case of *Harvey and Harvey, E. 1722.* The
father seised of a real estate, and possessed of a personal estate, and ha-
ving several children, deviseth all his real and personal estate to his eldest
son, charging the same with 1000 l apiece to all his younger children,
payable at their respective ages of twenty one; but in the will no notice
is taken of maintenance for the younger children in the mean time. The
younger children bring their bill, in order to recover interest, or some
maintenance during their infancy. Upon which, the master of the rolls,
having taken time to consider of the case, and having been also attended
with precedents, decreed, that the younger children should recover main-
tenance. He observed, that these being vested legacies, and no devise
over, it would be extreme hard that the children should starve, when
intitled to so considerable legacies, for the sake of their executors or ad-
ministrators, who in case of their deaths would have the said legacies:
That in this case, the court would do, what in common presumption the
father, if living, would (nay ought to) have done; which was, to pro-
vide necessaries for his children. 2 *P. Will. 22.*

28. It is usual in wills to devise all the household stuff; by which words
plate about the house, and not for ornament, passeth; but books, cattle,
clothes, coaches, corn, carts, ploughs, waggons, and any thing fixed to
the freehold, will not pass by that word. *Swin. a. 185.*

Household
stuff.

29. By a devise of household goods, plate will pass. 2 *Vern. 638.*
T. 1727. *Nichols and Osborn.* The testatrix devised all her household
goods to J. S. The question was, Whether by the devise of the house-
hold goods the plate should pass? Tho' it was reported on a reference
to a master, that there were manifest intentions and declarations of the
testatrix, that she did not intend the plate should pass; yet the master
certifying that the plate was commonly used in the house, all the evi-
dence touching the intention of the party was rejected, there being a
compleat and plain will in writing, which must not be altered or in-
fluenced by parol proof. 2 *P. Will. 419.*

Household
goods.

If a man deviseth 1200 l to J. S, and by general words deviseth all his
goods chattels and household goods in and about his house to the said J. S;
money in the house will not pass, he having a particular legacy devised to
him. *Swin. a. 185.*

30. It is usual likewise to devise all the goods moveable and immove-
able: Now by the civil law, actions and rights of actions pass by the
word moveables, especially when the words of universality are repeated
in

All his goods,
what it im-
plies.

in the will; as, I give to T S all my moveable goods and immoveable, of what kind soever, or wheresoever found. *Swin. a. 185.*

One deviseth all his goods; and whether a debt by bond passed to the devisee was the question: Decreed, by lord chancellor Cowper that it did; that these words seemed at common law to pass a bond, and to extend to all the personal estate; but this being in the case of a will, and a will relating to a personal estate too, it ought to be construed according to the rules of the civil law: now the civil law makes *bona mobilia* and *bona immobilia* the *membra dividenda* of all estates; *bona immobilia* are land, *bona mobilia* are all moveables, which must extend to bonds, and therefore by the devise of all the testator's goods, a bond must pass. *1 P. Will. 267.*

By a devise of all his goods, a lease for years will pass; if there be not some other circumstance to guide the intent of the devisee. *Swin. a. 200.*

But where a man devised to his niece *all his goods, chattels, household stuff, furniture, and other things which then were, or should be in his house at the time of his death*, and died, leaving about 265*l* in ready money in the house; it was decreed, that this ready money did not pass: for by the words *other things* shall be intended things of like nature and species with those before mentioned. *M. 1729. Trafford and Berridge. 1 Abr. Eq. Cas. 201.*

So where a man devised to his wife *all his household goods and other goods, plate, and stock within doors and without*, and bequeathed the residue of his personal estate to another; it was decreed, that the testator's ready money and bonds did not pass by the word *goods*: for if the words were to be taken in so large a sense, it would make void the bequest of the residuum; and therefore the words *other goods* should be understood to signify things of the like nature with *household goods*, that the whole will might have its effect. *3 P. Will. 112.*

Chattels doth
not imply
things which
go to the heir.

31. By a devise of all his chattels, the devisee shall not have glass of the windows, wainscot, tables dormant, firs in the brewhouse fixed to the freehold, nor furnaces, nor the box or chest wherein the testator's evidences are; nor doves in the dove house, nor fishes in the pond, nor deer in the park: for these things belong all to the heir. *Curf. 181.*

Lands, implies
the corn grow-
ing thereon.

32. If a man seised of land for life, or in fee, or tail, in his wife's right or his own, sows it with corn, or any manner of grain, and dies before severance; it shall go to the executor of the husband, and not to the wife or heir that shall have the land. *Went. 59. Swin. 421. 2 Inst. 81. Hob. 132.*

But where a man was seised of land in fee, and sowed the land, and devised the same, and died before severance; it was adjudged, that in this case the devisee should have the corn, and not the executors of the deviser; for the devisee, in relation to the chattels belonging to the land, is put in the place of the executors, by the words of the will. *M. 20 Ja. Spencer's case. Winch. 51. Swin. a. 183.*

So if a man seised in fee sows copyhold lands, and surrenders them to the use of his wife, and dies before the severance; it seems that the wife shall have the corn, and not the executors of the husband: for this is a disposition

disposition of the corn, it being appurtenant to the land; and since the husband hath disposed of it during his life, it cannot go to his executors.

1 *Roll's Abr.* 727.

And the reason why the corn passeth to the donee as appertaining to the soil when the property of the soil alters, and yet shall not descend to the heir as appertaining to the soil when the property of the soil remains in the first owner, is this: Because every man's donation shall be taken most strongly against himself; and therefore it shall pass not only the land it self, but the chattels that belong to the land. But no chattels can descend to the heir, and therefore they go to the executor. *Gilbert's Law of Evid.* 250.

So if land be sold; the corn growing shall go to the purchaser of the land, unless specially excepted. *Went.* 59.

A person seised in fee sows the land, and after grants it to *A* for life, remainder to *B*. *A* enters, and dies before the corn is severed: His executors or administrators shall not have the crop, because he was not at any charge or industry, but *B* shall have it. *Hob.* 132.

Generally, the distinction seemeth to be, where the estate is determined by the act of the party himself, and where it is determined by the act of another.

And therefore Littleton saith, if the lessee, being *tenant at will*, sow the land, and the lessor after it is sown, and before the corn is ripe, put him out; yet the lessee shall have the corn, and shall have free entry, egress, and regress, to cut and carry away the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is, if *tenant for years*, who knoweth the end of his term, sows the land, and his term ends before the corn is ripe; in this case, the lessor or he in the reversion shall have the corn, because the lessee knew the certainty of his term and when it would end. *Litt. sect.* 68.

And the reason why the tenant at will shall have the corn is, because his estate is uncertain; and therefore lest the ground should be unmanured, which would be hurtful to the publick, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is, if he set roots, or sow hemp, or flax, or any other annual profit; if after the same be planted, the lessor oust the lessee, or if the lessee dieth, yet he or his executors shall have that year's crop. But if he plant young fruit trees, or young oaks, ashes, elms, or the like, or sow the ground with acorns; there the lessor may put him out notwithstanding, because they will yield no present annual profit. — And this is not only proper to a lessee at will, that when the lessor determines his will, the lessee shall have the corn sown; but to every particular tenant that hath an estate uncertain. And therefore if tenant *for life* soweth the ground, and dieth; his executors shall have the corn: for that his estate was uncertain, and determined by the act of god. — And the same law is of the *lessee for years of tenant for life*. — So if a man be seised of land *in the right of his wife*, and soweth the ground, and he dieth; his executors shall have his corn, and if his wife die before him he shall have

the corn. But if husband and wife be jointenants of the land, and the husband soweth the ground, and the land surviveth to the wife; it is said that she shall have the corn. — So if a woman seised in fee or for life sows the land, and then takes a husband, and he dies before the severance; the wife shall have the profits, and not the executors of the husband: for the corn committed to the ground is a chattel real, which is annexed and belonging to the freehold; and not a chattel personal, annexed to the freehold and transferred. And therefore if the husband doth not dispose of it during his life, it belongs to the wife and not to the husband. — So if the husband sows the land, and dies before severance; the wife shall have the third part of the land so sown for her *dower*: for she shall be in of the best possession of her husband, above the title of the executor; and it would be unreasonable, if her husband had all corn land, that she should stay for her subsistence for a whole year, till the crop should be renewed. — If a man seised of lands in fee hath issue a daughter, and dieth, his wife being *ensient* with a son; the daughter soweth the ground; the son is born; yet the daughter shall have the corn, because her estate was lawful, and defeated by the act of god; and it is good for the commonwealth that the ground be sown. — But if the *lessee at will* sow the ground with corn, and after he himself determine his will, and refuseth to occupy the ground; in that case the lessor shall have the corn, because he loseth his rent. — And if a woman, that holdeth land *during her widowhood*, soweth the ground, and taketh husband; the lessor shall have the corn, because the determination of her own estate grew by her own act. — But where the estate of the lessee being uncertain is defeasible by a title paramount; or if the lease determine by the act of the lessee, as by forfeiture, condition, or the like: there, he that hath the right paramount, or that entreat for any forfeiture or the like, shall have the corn. — So if a *disseisor* sow the ground, and sever the corn, and he who is disseised re-enter; he shall have the corn, because he entreat by a former title: and severance or removing of the corn altereth not the case; for the regrefs is a recontinuance of the freehold in him in judgment of law from the beginning. 1 *Inst.* 55. 2 *Inst.* 81. 1 *Roll's Abr.* 727.

Devise in restraint of marriage.

33. Generally, by the ecclesiastical law, all conditions against the liberty of marriage are unlawful, as being a restraint on the natural liberty of mankind, and an hindrance to the propagation of the species.

So if the condition be, that the legatee marry according to the appointment, arbitrament, or consent of some other person, this is rejected as unlawful. *God. O. L.* 45.

But if the conditions are only such as whereby marriage is not absolutely prohibited, but only in part restrained, as in respect of time, place, or person; then such conditions are not absolutely to be rejected. *God. O. L.* 45.

So if the condition be, not to marry before the age of twenty years, this condition is to be performed; otherwise, if it is continued to an unreasonable length.

So if the condition be, not to marry such a particular person, or a widow, or of one particular place, or the like.

Generally, in the temporal courts, the distinction seemeth to have been, where the legacy is devised over to another, and where it is not devised over: in the former case it hath been held, that the restraint shall be good, so as the legacy shall not be due, unless the condition be performed; but in the latter case, where there is no devise over, it hath been held, that the proviso or condition is only in terrorem, to make the person careful, but not to defeat the legacy. 1 *Cha. Ca.* 22. 1 *Vern.* 20. 2 *Vern.* 293. 357.

And upon this foundation the case of *Hervey and Aston*, M. 10 G. 2. before the master of the rolls, seemeth to have proceeded: The case was, Sir Thomas Aston by settlement after marriage created a term in trust by mortgage or sale to raise 2000l for each of his daughters portions, "provided they marry with their mother's consent, and if either die before marriage with such consent, her portion to cease, and the premisses to be discharged; and if raised, then to be paid to the person to whom the premisses should belong:" and afterwards by will created another trust term to augment their fortunes 2000l apiece more, but *subject to the condition as in the settlement*, and gave the residue over and above the 2000l apiece to his wife: and by a codicil created another trust term for the better raising of his daughters portions. Sir Thomas died, leaving two daughters. One of them married after the age of 21, the other before the age of 21, and both of them without the consent of their mother. The master of the rolls decreed, that the portions should be paid notwithstanding; proceeding upon a supposition, that the portions by these words were not devised over. *Cha. Ca. Talb.* 212.

But on an appeal from this decree, the lord chancellor Hardwicke, assisted by the two chief justices Lee and Willes and the chief baron Comyns, reversed the decree; and the arguments urged by the court for this reversal seem to proceed upon a supposition, that the proviso or limitation shall be good, whether the portions be devised over or not. Namely, first, that it is the right and liberty of the subject, who makes a voluntary disposition of his own property, to dispose of it in what manner, and upon what terms and conditions he pleaseth. Secondly, that it is an established maxim of law, that if an estate in land, or interest out of the land, is limited to commence upon a condition precedent; nothing can vest or take effect, till the condition is performed. And this is so strong and so settled a point, that altho' the previous act was at first impossible by the act of god, or other accident, the estate can never vest. Thirdly, that it is most agreeable to the rules of equity, to direct the execution of the trust according to the intent of him who appointed the trust. — It is said, that a trust is to be construed favourably: and it is true, it is to be construed with as much advantage as may be to make good and answer the intent and design of the party, but it is to be construed strictly with regard to the execution of the trust; and therefore it would be a strange thing, when the trust directs the trustees to pay the money at the time of the daughter's

ter's marriage with her mother's consent, that the court should direct them to pay the money before that time. Fourthly, that a restraint in the present case is not only lawful, but prudent and reasonable; and no consequence more likely to ensue from it, than the hindrance of an inconsiderate or imprudent marriage. *Comyns* 744.

And upon these principles the statute of the 26 G. 2. c. 33. seemeth afterwards to have been established; which, in the case of a person under 21 years of age marrying without the consent of parents or guardians, renders the marriage itself null and void.

In the case of *Needham* and *Vernon*, 25 C. 2. Lands were devised in trust for raising portions for daughters, payable upon their marriages with consent of the trustees; but if they married without consent, then to remain over to another. The daughters were old, and never intended to marry, but to lay out their portions in a purchase of annuities for their lives. And it was held that they should have their portions immediately, upon giving security to indemnify against the persons to whom the portions were devised over. — And the like hath been decreed, upon giving security to refund, if the condition should be broken. 1 *Abr. Eq. Cas.* 111.

Condition not
to give trouble
to the execu-
tor.

34. If a legacy be given on condition not to dispute the will, and the legatee commenceth a suit whereby he disputes the validity of the will, yet this is no forfeiture of the legacy, if there was probable cause of contesting it. 3 *Bac. Abr.* 479.

And even altho' there be no probable cause; yet where a legatee, or other person interested, hath a right to see the will proved in solemn form, his making use of that right cannot (as it seemeth) be deemed a disturbance.

E. 1724. *Nutt* and *Burrel*. The testator gives to *B* a legacy, on pain of forfeiture of it, in case he should give his wife (whom he made executrix) any trouble in relation to his estate. *B* brings a bill against the wife, for which there was very little colour, and amongst other things demands his legacy. The chancellor was of opinion that the suit was very frivolous, but would not declare the legacy forfeited. *Cha. Ca. King.* 1.

But in the case of *Cleaver* and *Spurling*, T. 1729. A person by his will gives a legacy to his daughter, provided that if she or her husband refuse to give a release, or put the executors to any trouble, the same shall go over to her sister's children. The daughter and her husband (being within the custom of the city of London) sue for her orphanage part. Decreed, that the legacy was forfeited; for however it might have been construed to be intended only *in terrorem*, yet being devised over, and by that means a right to this legacy being vested in a third person, a court of equity could not divest it or call it back again. 2 *Peere Will.* 528.

H. 1710. *Webb* and *Webb*. The father gave a legacy of 40l to his son, upon condition that he should not disturb the trustees. They applied to the court for an execution of the trust, and that he might either join with them

them in a sale, or lose the legacy. And it was decreed accordingly, by Harcourt lord chancellor. 1 *P. Will.* 136.

35. Lord Coke says, where in one will there be divers devises of one thing, the last devise taketh place. 1 *Inst.* 112. Thing devised twice.

But lord chief baron Gilbert seemeth to say, that if lands be devised to one, and after in the same will to another; they shall take it between them.

Gillb. 159.

36. A devise by one joint tenant of land devisable, which he holdeth in fee, at his death, jointly with a stranger, is not good: But if such devisor doth survive all his companions, then such devise is good. Things which a person hath jointly with another.

Perk. 219.

Also a man cannot bequeath by will any of those goods or chattels which he hath jointly with another, tho' by act in his life time he might dispose of his part; if he bequeath his portion thereof to a third person, the legacy is void, and the survivor shall have the whole, notwithstanding the will. But joint merchants are to be excepted out of this rule; for the wares, merchandizes, debts, or duties which they have as joint merchants or partners, shall not survive, but shall go to the executor of him that dies; and this by the law of merchants. *Law of Test.* 188.

And by the custom of the city of London, he which holdeth tenements in London jointly with others, may devise that which belongeth to him, without any other severance. *Privileg. Lond.* 145.

37. Generally, If the legatary die before the legacy be due, the legacy is extinguished. In what cases a legacy shall be said to lapse. Inasmuch that if the testator by his last will do bequeath his lands and tenements to a man and his heirs; yet if such person die before the testator, the devise is merely void, and his heirs cannot recover the land by force of the will; because the devisee was not in being when the will should take effect; and the word heirs in this case is not a designation of the person who shall take, but a limitation of the estate; for if it was a description of the person, then his widow would be endowed.

Plowd. 345. *Swin.* 35, 560. *Law of Test.* 230.

And so it is, if the devisee of a copyhold die before the devisor; notwithstanding the surrender by the devisor of the copyhold to the use of his will. *Str.* 445.

And so also it is, if the legatee lives as long as the testator, but doth not survive him; for they may both die at one instant, as in a storm at sea they may both be drowned together, or by the falling of an house may both be killed at once: but if the legatee overlive the testator, even tho' it be but for a moment, the legacy is due, and may be recovered by the executors or administrators of the legatee. *Law of Test.* 231.

M. 6 An. Snell and Dee. The testator bequeathed by his will in these words; I give 100l a piece to the two children of J S, at the end of ten years after my decease. The children died within the ten years. And by Cowper lord chancellor, This is a lapsed legacy, and shall not go to the executors of the children: For the diversity is, where the bequest is to take effect at a future time, and where the payment is to be made at a future

a future time: Wherever the time is annexed to the legacy it self, and not to the payment of it; if the legatee dies before the time of payment, it is a lapsed legacy in that case. 2 Salk. 415.

T. 1721. *Bagwell and Dry*. The testator, amongst other things, bequeathed the surplus of his personal estate unto four persons equally to be divided among them, share and share alike; and made A B his executor in trust. One of the four residuary legatees died in the life of the testator. After which, the testator died. And the question being, to whom the fourth part devised to the residuary legatee who died in the life of the testator belonged; the lord chancellor, after time taken to consider of it, delivered his opinion, that the testator having devised his residuum in fourths, and one of the residuary legatees dying in his life time, the devise of that fourth part became void, and was as so much of the testator's estate undisposed of by the will; that it could not go to the surviving legatees, because each of them had but a fourth part devised to him in common, and the death of the fourth residuary legatee could not avail them, as it would have done had they been all joint tenants, for then the share of the legatee dying in the life time of the testator would have gone to the survivors; but here the residuum being devised in common, it was the same as if the fourth part had been devised to each of the four, which could not be increased by the death of any of them. This share shall not go to the executor, he being but a bare executor in trust; and consequently it belongs to the testator's next of kin according to the statute of distribution; and as to this, the executor is a trustee for such next of kin. 1 P. Will. 700.

M. 2 G. 2. *Page and Page*. A Person deviseth to his six relations, all his lands and all his personal estate, in trust to perform his will, and after all these things discharged, directed that the remainder should be equally divided amongst them, share and share alike, and made his said six relations executors. One of the six legatees died, and then the testator died. The question was; whether the share of that legatee who died in the life time of the testator should go to the surviving legatees, as part of the residuum; or whether in this case it should go to the next of kin of the testator, as so much of his estate undisposed of. It was argued, that where there is a lapsed legacy, it falls into the residuum of the personal estate generally; but here a part of the residuum it self is a lapsed legacy, and consequently undisposed of, and ought to go to the next of kin of the testator. For the executors are to take nothing as executors, but as residuary legatees. And one of the legatees dying in the life time of the testator, his share must go according to the statute of distributions, as undisposed of. And so it was decreed. Str. 820.

M. 1705. *Elliot and Davenport*. The testator by his will reciting, that B owed him 400l, gave and bequeathed the same to him, provided that out of it he paid several particular sums in the will mentioned, to his wife and children, and the residue he freely and absolutely gave him, and required his executor, immediately on his death, to deliver up the security, and

and not to meddle with the debt, but to give such release as *B* his executors or administrators should require. *B* died in the life time of the testator. It was held, that the money directed to be paid to the wife and children was well devised; but as to the residue devised to the debtor himself, it was a lapsed legacy, he dying in the life time of the testator; but it was admitted, that if the testator had said, *I forgive such a debt*, or that my executor shall not demand it, or shall release it, that would have been a good discharge of the debt, tho' the debtor had died in the life time of the testator. 2 *Vern.* 521. 1 *P. Will.* 83.

T. 1731. Willing and Baine. The testator devised by his will 200*l* a piece to his children, payable at their respective ages of twenty-one; and if any of them died before twenty one, then the legacy given to the person so dying to go to the surviving children. One of the children died in the testator's life time. And the question was, whether the legacy should go to the surviving children, or should be a lapsed legacy, and sink into the surplus. By the court; The rule is true, that where the legatee dies in the life of the testator, his legacy lapses, that is, it lapses as to the legatee so dying; but in this case the legacy is well devised over to the surviving children. 3 *P. Will.* 114.

Devise of a legacy to a person and his assigns; the legatee died before it was paid: adjudged, that his administrator shall have it as assignee in law. 1 *Roll's Abr.* 915

When the legacy is conditional, the legacy is not due, until the condition be performed: And therefore if the legatee die before the condition is performed, the legacy is extinguished; except in some few cases. *Law of Test.* 231.

If a legacy be given to a child, payable at his age of twenty one years, and the child dies before he attain that age; tho' the administrator of the child is intitled to the legacy, yet he shall not have it till such time as the child, if he had lived, would have attained his age of twenty one years. 2 *Vern.* 199. 2 *P. Will.* 478.

But if a legacy be devised to a child payable at his age of twenty one years, and if he dies before that age, then the legacy to go over to another; in this case, if the child dies before he attains the age of twenty one, the second legatee shall have the legacy immediately. 2 *Vern.* 283. 2 *P. Will.* 478. *Viner.* Devise. G. d. 35.

So if a legacy be given to an infant, to be paid at his age of twenty one years, and the executors to pay interest for it until it becomes payable; if the infant dies before twenty-one, it is due presently to the executor or administrator of the infant: but if no interest was to be paid for it, then it shall not be paid until such time as the infant would have come to twenty one in case he had lived; because there it is a benefit the testator intended to the executor by keeping it in his hands; but in the other case it would be none, when interest was payable. 2 *Freem.* 64.

So where the testator bequeathed to an infant 1000*l*, payable at twenty one; and in the mean time the infant to have the yearly sum of 20*l*,

not amounting to the interest of the legacy given him. The infant died before twenty one. It was held by Raymond chief justice, Jekyl master of the rolls, and Eyre chief justice, that the executors of the infant should wait for their legacy, till such time as the infant had he lived would have been twenty one; it being unreasonable that the executors of the infant, standing in his place, should be in a better case than the infant himself would have been had he been living; and it was to be presumed, that the testator had made a computation of his estate, and considered when the same would bear and allow of the payment of this legacy; and that no reason could be given, why an uncertain accident should accelerate the payment of this legacy before the time, which was at first intended for that purpose. 2 *P. Will.* 335.

Generally, it is to be considered, whether the time be joined to the *substance* of the legacy, or to the *payment*: If it be joined to the *substance* of the legacy, and the legatee dies before the day, the legacy is gone; as if the testator give to *B* 100l when he cometh to the age of twenty one years, and *B* dieth before, the legacy will not go to his executors or administrators: But if the day be joined to the *payment* of the legacy, the executor or administrator of the legatee shall have the legacy, tho' the legatee die before the day; as if the testator bequeath 100l to *B*, and wills that it shall be paid to *B* when he attains the age of twenty one years, yet his executors or administrators may recover the legacy when the time is expired that *B* should have attained that age if he had lived. *Law of Test.* 232, 233.

And this is agreeable to the rule of the civil Law, which is, that if a legacy be devised to one generally, to be paid or payable at the age of twenty-one, or any other age; yet this is such an interest vested in the legatee, that his executor or administrator may sue for and recover it; for it is *debitum in presenti*, tho' *solvendum in futuro*, the time being annexed to the payment, and not to the legacy it self: So if the legacy is made to carry *interest*; tho' the words *to be paid*, or *payable* be omitted, it shall be an interest vested. But if a legacy be devised to one *at* twenty one, or if *when* he shall attain the age of twenty one, and the legatee dies before he attains that age, the legacy is lapsed. But where the legacy is to arise out of a *real* estate; this, by the better authorities, shall not go to the representative of the legatee, but shall sink in the inheritance for the benefit of the heir, as much as if it was a portion provided by a marriage settlement. But when the legacy is to be paid out of a *personal* estate, the above distinction hath been allowed of; and Cowper lord chancellor said, 'that tho' it was at first introduced upon very slender reasons, and probably upon no other but from a constant willingness in the civil law to stretch in favour of a particular legatee, against the residuary legatee who went away with the whole surplus of the personal estate; yet as the chancery hath now a concurrent jurisdiction with the spiritual court in matters of this nature, he thought it highly reasonable that there should be a conformity in their resolutions, that the subject might have the

the same measure of justice, in which court soever he sued. *Law of Test.* 242, 243.

M. 1682. *Smith and Smith.* The testator devised 100l to his daughter for her portion, chargeable upon a *real* estate, and payable at twenty one; and the daughter died before twenty one: the portion shall sink in the land. But it is otherwise, if no time had been limited for the payment of the portion; for in that case it goes to the executor of the daughter. And there is no difference, whether the portion is secured by settlement or by will, if it be to be raised out of a real estate, and the party dies before it is payable; for in either case it sinks in the lands. *2 Vern.* 92.

H. 1690. *Norfolk and Gilford.* The Testator by will charged his lands with 6000l, for the child his wife was then enſient with, if it proved a daughter; with a clause of entry for non-payment. A daughter is born, who dies. It was decreed, that the 6000l should not be raised for the benefit of her administrator. *2 Vern.* 208.

M. 1684. *Bartholomew and Meredith.* The testator devised lands to be sold for payment of portions to younger children, and one of the children dies after the portion was payable, tho' before the lands sold. It was held, that it being an interest vested, his administrator should have it. *1 Vern.* 276.

E. 1701. *Jackson and Farrand.* The testator by will gave 500l to his daughter, to be paid by his executors at the age of twenty-one out of his personal estate and the rents of his real; and if not raised by that time, the executors to stand seised and take the rents till 500l is raised, and after payment gives the land to his son. The daughter marries at eighteen, and dies under twenty one, leaving issue a daughter. The husband takes administration. It was held, that the portion should be raised, and that by a sale, tho' the land would produce little more than the 500l. *2 Vern.* 424.

H. 1740. *Lowther and Condon.* Thomas Condon, esquire, by his will gave unto his daughter Diana Condon the sum of 1000l, to be raised and paid unto her, immediately after the decease of her mother, out of her mother's jointure lands, with interest of six pounds in the hundred from the death of her mother till the same should be paid. Thomas Condon dies. After which, his daughter Diana intermarries with Sir William Lowther, and dies in the life time of her mother. Last of all the mother dies. And Sir William Lowther, as administrator to his wife, brings his bill for the recovery of the 1000l. It was insisted by the defendant the heir at law, that as the said sum was to be raised and paid out of the lands, and the late lady Lowther died before the time when this sum became payable, namely, before the death of her mother the testator's widow, the same ought to sink into the estate for the benefit of the heir, and ought not now to be raised. By Hardwicke lord chancellor: It is clear, if this were to be paid out of a personal estate, it would have been transmissible to an administrator: It is indeed true, that it hath been an established rule in general, as to real estates,

that where a legatee dies before the time of payment of the legacy, it shall sink into the estate; but with regard to portions or fortunes for daughters, the circumstance of the legatee is to be considered; as where a portion is given to one immediately, payable when she attaineth the age of twenty one or marrieth, and such person dieth before either of the contingencies happeneth, it ought to sink, because the legatee wanted no personal provision; but in this case, as lady Lowther was married, and lived married for some years, there is the less reason that it should sink. And it was decreed, that this was an interest vested, and as such transmissible to the administrator, and the legacy should not sink into the estate for the benefit of the heir at law.

But if a legacy be chargeable *both* upon the real and personal estate; then so much thereof as the personal estate will extend to pay, shall go to the executors or administrators of the child; for in such case, as far as the executor or administrator claims out of the personal estate, he shall succeed according to the rule of the spiritual court where these things are determinable, altho' the infant legatee dies before the portion or legacy becomes due: But so far as such legacy is charged upon the land; the court of chancery will not countenance the loading of an heir, merely for the benefit of an administrator. *2 P. Will. 276, 601.*

Surplus.

38. It seemeth now to be the general opinion, where there is an express legacy given to an executor, and no devise of the surplus, that such surplus shall not go to the executor, but thereof he shall be only a trustee for the next of kin, and the same shall be disposed according to the statute of distributions. But where no express legacy is given to the executor, there the surplus shall go to the executor, if not otherwise devised in the will. *Law of Test. 416, 417.*

M. 1687. Foster and Munt. A man devised particular legacies to his children and grandchildren, and 10l a piece to his executors for their care; the surplus of the personal estate being 5000l and upwards. The question was, Whether the surplus should be a trust for the children, or go to the executors. And it was decreed a trust for the children. And the decree was affirmed in the house of lords. *1 Vern. 473. 2 Vern. 648.*

H. 1697. Earl of Bristol and Hungerford. The testator devised lands to be sold for payment of his debts, and ordered that the surplus should be deemed part of his personal estate and go to his executors, and gave to his executors 100l apiece as a legacy. The question was, Whether the executors should have the surplus to their own use, or should distribute according to the statute of distribution. For the executors it was insisted, that the surplus should be part of his personal estate, and go to them, and that he meant it to their own use; and his giving them a legacy of 100l apiece cannot alter the case, for the surplus perhaps might be nothing; and therefore he gave them the 100l, that they might at all events be sure of something, and not to exclude them the benefit of the surplus: and this being a devise of the surplus, after debts and legacies paid, cannot be a trust in them, for then all their trust is performed, when debts and legacies are paid. On the other side it was said, that

that the words in the will, that the surplus should be part of his personal estate and *go to his executors*, were only intended to exclude the heir, who else would have had it, and not to give any greater interest to his executors than they would have had otherwise. And of that opinion was the lord chancellor, who decreed that they were trustees of the surplus for the next of kin. 1 *Abr. Cas. Eq.* 244.

But where a man devised his library of books to one, except ten books such as his wife should chuse, and made her executrix; it was decreed, that she should not by this devise be excluded from the benefit of the surplus of the personal estate. *T.* 1704. *Griffiths and Rogers.* 1 *Abr. Cas. Eq.* 245.

So where one not of kin, but a stranger, was made executor, and had considerable legacies given him; altho' it was decreed, in favour of the testator's two brothers, that the surplus should be distributed, yet upon appeal to the house of lords, that decree was reversed; not barely as it stood upon the will, but that parol proof ought to be received in favour of the executor's title, consistent with the will; and the proof being full, as to the testator's frequent declarations, that his executor, tho' a stranger, should have the surplus, it was decreed accordingly. 1 *Abr. Eq. Cas.* 245.

This point, how far the executor shall be intitled to the surplus, altho' he be not by the express words of the will appointed residuary legatee, having been long litigated; in the year 1725, King then lord chancellor brought a bill into the house of peers (which passed that house) to settle the point: but it was thrown out by the house of commons. The bill was to have settled it for the benefit of the executor. *Str.* 569.

But since that time, the general rule seemeth to have been, that where executors have legacies given them, and the surplus is not specially devised, they shall be trustees of the surplus for the next of kin, unless there appear in the will special circumstances of the testator's intention to the contrary.

In the year 1736, Sir *Joseph Jekyll*, speaking of the case of *Foster and Munt*, said, It had been often urged, that that case turned upon fraud; but that he had looked into all the proceedings, and there was no such thing pretended, but the whole turned upon this,—that as the executors legacy was given for their care, unless such care was to turn to the benefit of others, and not of themselves, the will would be absurd; and therefore it necessarily followed, that the testator designed them only to be trustees for the next of kin; and tho' no such declaration was made, yet the legacy being given generally, the law made the same construction, and it was for their care; it being impossible to imagine, that the testator would give a general legacy, if he intended the executors should take the whole. 2 *Abr. Eq. Cas.* 443.

And in the case of *Newstead and Johnson*, July 15, 1740. The testator *William Lawson* directed 3000*l* out of his stock in trade, to be laid out in lands to be settled to the use of his first son in tail male, with remainders over; and as to all the rest and residue of his joint stock and partnership

ship in trade, he gave it to *John Senior* his executors administrators and assigns; and his will and desire was, that *Allen Johnson* his son in law and the said *John Senior* agree to be partners, and enter into articles as counsel shall advise; and as to his said devise to *John Senior*, he declared the same to be in trust only for his daughter *Elizabeth Johnson*, for her sole and separate use during her life, and for such other uses and purposes as she should appoint by any deed or writing in her life time, or by her last will and testament, notwithstanding her coverture; and his will was, that the said *Allen Johnson*, his daughter's husband, should have nothing to do with the same, or receive any part thereof, otherwise than as joint partner. Then the testator, after giving several directions about the partnership, makes his daughter *Elizabeth Johnson* sole executrix. The testator died. And his debts and legacies being paid, there remained a large surplus; for an account of which the bill was brought, and that the executrix might be a trustee of the same for the next of kin to the testator. —By the lord chancellor *Hardwicke*: The cases in regard to excluding executors from taking the surplus of the personal estate, by reason of the particular legacies before given to them, have been very various, and undergone different determinations, according to the different circumstances and opinions and way of reasoning of different persons concerning them; and it is absolutely impossible to reduce all those cases to any certain general rule, without some contrariety between them. But I think the present case a very plain one, that the executrix here should not be excluded from the surplus. —The law is clear, that where a man makes his will, and an executor; it is a gift in law of all his personal estate to him. So is the rule of the ecclesiastical court. Therefore it is, that where a suit is brought in such case for a distribution of the residuum undisposed of by the will, this court will prohibit them from proceeding in such suit; because they are bound to give the residuum to the executor. And this court interposes upon a supposed trust in the executor, of which that court has no cognizance. And I remember some cases, one at the latter end of queen Anne's time, and another since, and another when I sat as chief justice in the king's bench, where such prohibitions have gone. So that the ground upon which executors have been in any cases compelled to distribute the surplus, has been, upon certain circumstances in equity, which have induced a violent presumption, amounting to evidence, that the executor was intended only a trustee. —The first case was *Foster and Munt*; where it was sent to the master to inquire what the surplus amounted to. And I have heard, that arose in a great measure from an ill opinion the lord chancellor *Jefferies* had of the executor's behaviour in obtaining that will. And it being reported to amount to 5000l, he thought that it was absurd to say the testator would have given the executor so small a legacy as 10l for his care and pains, if he had meant at the same time to give him the surplus. But there was no particular evidence of any fraud in the case, but only such a general charge in the bill. So that the decree was founded wholly on that single point. —From that time, it was taken, that where a legacy was given to an executor for his care and trouble,

trouble, without any disposition of the surplus, that he should be considered as a trustee. And that was founded upon good reason: for such a legacy for care and pains, was a plain declaration of the testator's intention, that as to the rest, the executor should not take it to his own use; for it were ridiculous to suppose, that the testator should give him a small legacy for his trouble in managing an estate for himself.—Afterwards the court went further in the like kind of reasoning, and held, that where a particular legacy was given to the executor generally, without saying for care and pains, even this would exclude him from the surplus, because of the absurdity (as no doubt there would be) in giving him some, and giving him all. From whence the court raised an implication, that since the testator had given him a part, he never intended him the whole. And this point is now established: tho' it was at first objected, that the particular legacy might be owing to a doubt of the testator, that the whole personal estate might not prove more than sufficient to pay all the legacies; in which case the executor could have nothing. For which reason the testator might be unwilling to leave him to the chance of the surplus, but would secure something to him by a particular legacy, and then in case of a deficiency he would abate only in proportion. However, this point has been now long established, and is not to be controverted by such an argument. And I remember in the case of *Farrington and Keely*, lord *Macclesfield* said, that he had consulted Mr *Vernon*, who had then left the bar, who told him that he did not then trouble himself with taking notes of modern resolutions upon this point; because he looked upon it to be as plain and settled, as that an estate to a man in fee should descend to a man and his heirs.—Other cases have been determined in favour of the next of kin, upon the circumstances of proximity of blood: But these determinations have been overruled in later cases; because that reasoning might produce great uncertainty. For if that distinction were to be admitted, then a distinction would arise as to those of a nearer degree of kindred and those who are more remote; and if the testator's estate was to depend on such circumstances, it would bear a very uncertain construction.—I mention these things to lay them out of the case: For the ground of my determination is, that this legacy is given to a wife, of stock in trade, in trust for her separate use, and under very particular circumstances. The intent of the testator is manifest. He gives the particular legacy in trust for the wife, who was his daughter; because otherwise it would have passed to the husband as his absolute property; for tho' upon her death it would have passed from her to the administrator *de bonis non*, yet the husband would have it in point of property and interest, as he would be intitled to it after the debts and legacies were paid out of the assets: Which reason does not extend to the residuum; for that it does not appear but he intended the husband should have that as well as his daughter; and no implication can arise upon a will but by a necessary construction; if so, the testator had no occasion to make an express devise of that in trust, as he did of the other.—It was said in the argument of this cause, that a particular legacy given in trust

trust for an executor, will have the same effect in point of law, and bar him of the residuum, as much as if the legal interest of the legacy were given him. And that is certainly true; because it implies nothing which makes any difference between such a devise in trust and an absolute one: but, as I said before, here was a particular reason why this legacy was expressly given in trust, for the husband could not have been otherwise excluded; and it is, that the trustee may enter into partnership with the son, and he is to improve the stock for the separate use and benefit of the wife; which prevents the common implication, that the residuum should not pass. Therefore I think there is no ground in this case, to make the executrix account for the surplus; and as to that, the bill must be dismissed.

So in the case of *Blinkborn and Teast*, in the year 1750: The testator gave a pecuniary legacy to *A.* and another of a different value to *B.* both infants, and made them his executors. The question was, as to the residue of his personal estate, whether it should result to the next of kin, or go to his executors. By the lord chancellor *Hardwicke*: Though the law casts the whole personal estate upon the executor; yet as a will is to be construed chiefly according to the intention of the testator, if it appear manifestly his design that the executor shall not have it, it shall be distributed by this court. As where a specific legacy is given to an executor, he shall not have the residue; as it would be absurd to think, that the testator after he had given him what he thought convenient, should also intend to give him the whole residue, which would include the particular legacy. Yet in many cases this construction may be improper; and therefore the rule of law has been suffered to take place. As in the case of *Griffith and Rogers*, where the executrix had a specific legacy of ten books. And in the case of *Jones and Westcomb* (Prec. Ch. 316.) where a man, possessed of a long term, devised it to his wife for life, and after her death to the child she was then ensient with, and made her executrix. For in this case it was necessary to devise the term to her specifically, for the sake of the limitation to the child. In the present case, not to mention that it is improbable the testator would have made these persons who are infants his executors, merely for the purpose of distributing his personal estate, without any benefit to themselves; it was very proper he should give them these legacies, tho' he might intend they should after have the residue; for they do not take the legacies, as they will the residue; for this they are intitled to jointly and equally, and the survivor will take the whole. But the legacies are unequal in value, and their interest in them different and separate. And it cannot be inferred that the residue includes the particular legacies; for as they are bequeathed, the legatees are intitled to them in severalty, and with different interests; whereas if he had not separated them, they would have devolved jointly, and otherwise than he intended they should. And he decreed the residue to the executors.

Wills how revocable.

39. By the statute of the 29 C. 2. c. 3. No devise in writing of lands tenements or hereditaments, or any clause thereof, shall be revocable, other-

otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator or by his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same. s. 6.

And no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause devise or bequest therein be altered or changed, by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least. s. 22.

Otherwise than by some other will, or other writing of the devisor — signed in the presence of three or four witnesses] *M. 1689. Eccleston and Speke.* Lady Speke by will gave her lands to one and his heirs. Afterwards she made another will, by which also she gave her lands to the same man and his heirs; but this last will was held void to pass lands, because the witnesses did not subscribe it in her presence. It was objected, that this was good however as a revocation of the former will. But by the court; It cannot operate as a revocation, because contrary to her apparent intent. To revoke by a will, within the words of the statute, must be by a will attested by three witnesses, and subscribed by them in the presence of the testatrix, which this will was not. *Carth. 81.*

H. 1716. Onyons and Tryers. A man makes his will duly executed and attested, and at the same time in like manner executes a duplicate thereof. Some time after, having a mind to change one of his trustees, he orders his will to be written over again, without any variation whatsoever from the first, save only in the name of that trustee. And when it was so written over, he executes it in the presence of three witnesses, and the three witnesses subscribed their names, but not in his presence. After this, the testator cancels the duplicate, by tearing off the seal; and then dies. The question was, whether this second will, not being good as a will to pass lands, should yet be a revocation of the first; and if it should not, whether the cancelling the other should be a revocation thereof within this statute. And it was decreed, that neither the making the second, nor the cancelling of the first, was a revocation thereof, tho' in the second there was an express clause that he did thereby revoke all former and other wills: wherein the lord chancellor took this distinction, that the second was not intended barely a revocation of the first, so as to signify his intention of dying intestate; but it was intended as an effectual will to pass the lands to the persons, and in the manner thereby devised; and therefore if it was not good as a will to that purpose, it was no revocation of the first. 1 *Abr. Eq. Cas.* 408.

But

But if a man cancels or revokes either the duplicate or original will, this, it is said, is an effectual avoiding of both: they being both but one will, and therefore must stand or fall together. *Id.*

E. 1754. Ellis and Smith. A man makes a will, and by it revokes a former will. The only proof of the execution of this latter will was, by three witnesses, who did not see him sign or seal it, but upon their being called in he acknowledged it to be his handwriting and seal, pointing with his finger to the will; upon which they attested it. Two questions arose: 1. Whether considering this as an original will, it is well executed. 2. If it is, whether it be well executed as a revocation, because by the statute it ought for this purpose to be *signed in presence of the witnesses*. By the lord chancellor *Hardwicke*: As to the former question, if this had been *res integra*, it would have been a matter of doubt with me, but it is *res adjudicata*, and must now be taken as decisive. All the cases where an attestation by three witnesses at different times is held good, are authorities in point; for they must all be founded upon the proof of this very fact, the acknowledgment of the testator that it was his handwriting. It could not be a different execution before each witness, for then there would be three executions, and the act would not be complied with, as it requires three witnesses to one execution: and as to the *sealing*, — putting any thing on the seal, as a finger, *animo signandi*, is good enough. But he seemed to think that sealing was not *signing* within the statute, contrary to the *obiter* opinion in *Lemain and Stanley* (3 *Lev.* 1.) — As to the second, he said, that the words *signed in the presence of three witnesses*, refer to the next preceding words [*other writing*] only, and not to a will or codicil; and so it was determined (3 *Med.* 218.) in the case of *Hoyle and Clarke*.

But where there was a devise of lands to one, and afterwards the deviser by a will duly executed and attested devised the lands to another who was a papist; it was decreed, that both the devises were void: for tho' the latter was void as a will, yet it was good as a revocation. 2 *Abr. Eq. Cas.* 771.

But a will which will pass personal estate, is not a sufficient revocation of a former will whereby a real estate is devised. *Comyns* 451.

And altho' the statute says, that no will in writing concerning personal estates shall be repealed by word of mouth only, except the words be put into writing, and read to and allowed by the testator, and proved to be so done by three witnesses; yet where a man by will in writing devised the residue of his personal estate to his wife, and she dying, he afterwards by a nuncupative codicil bequeathed to another all that he had given to his wife, this was resolved to be good: for by the death of the wife, the devise of the residue was totally void; and the codicil was no alteration of the former will, but a new will for the residue. 1 *Abr. Cas. Eq.* 408.

Also, the statute hath not taken away revocations of wills by *act of law*; as if the testator afterwards make a feoffment, or do any other act inconsistent with the will: but such revocation remains as before the statute. *Carth.* 81.

If a man devises lands to one and his heirs, and afterwards mortgages the same lands to another for years or in fee; tho' a mortgage in fee is a total revocation at law, yet in equity it shall be a revocation *pro tanto* only. 1 *Abr. Eq. Cas.* 410.

And the reason is, because a mortgage is not considered as a conveyance of the estate, but only as a charge upon it; being merely a security, and in the consideration of equity carries only a chattel interest, the creditor gains nothing real, it affords no dower, and goes to executors. *Sparrow and Hardcastle*, May 6. 1754.

But if lands be devised to one in fee, and afterwards mortgaged to the same devisee; this is a revocation *in toto*, being inconsistent with the devise: but if the mortgage had been to a stranger, it had been a revocation *quoad* the mortgage only. *Prec. Cha.* 514.

If a man seised in fee, devises it to one in fee or for life, and afterwards makes a lease to another for years; this, even at law, shall not be a revocation but during the years. 1 *Roll's Abr.* 616.

So if a husband possessed for forty years, devises it to his wife, and after leases the land to another for twenty years, and dies; this lease is not any revocation of the whole estate, but only during the twenty years, and the wife shall have the residue by the devise. *Id.*

But where a man seised of a lease for lives, devised it, and afterwards surrendered the old lease, and took a new one to him and his heirs for three lives; it was decreed, that this renewal of the lease was a revocation of the will as to this particular. For by the surrender of the old lease, the testator had put all out of him, had divested himself of the whole interest; so that there being nothing left for the devise to work upon, the will must fall, and the new purchase, being of a freehold descendible, could not pass by a will made before such purchase. 3 *P. Will.* 166, 170.

Tho' a covenant or *articles* do not at law revoke a will; yet if entred into for a valuable consideration, amounting in equity to a conveyance, they must consequently be an equitable revocation of a will, or of any writing in nature thereof. 2 *P. Will.* 624.

A woman's marriage, is alone a revocation of her will. *Id.*

A man by his will gave his four daughters 600l apiece, and afterwards married his eldest daughter to the plaintiff, and gave her 700l portion. After that, he makes a codicil, and gives 100l apiece to his unmarried daughters, and thereby ratifies and confirms his will; and dies. The plaintiff preferred his bill for the legacy of 600l given to his wife by the said will. It was held by the master of the rolls, that the portion given by the testator in his life time should be intended in satisfaction of the legacy. And it was agreed to be the constant rule, that *where a legacy is given to a child, who afterwards, upon marriage or otherwise, receives the like or a greater sum, it shall be intended in satisfaction of the legacy*, unless the testator declares his intention to be otherwise. And it was said, the words of *ratifying and confirming* do not alter the case, tho' they amount to a new publication; being only words of form, and declare nothing of the

the testator's intent in this matter. 2 *Freem.* 224. Irod and Hurst, M. 1698.

A man made a will, and appointed one (who was no relation) to be his executor. He afterwards went abroad, where he became a governor of one of the plantations, and sent over for an English woman of his acquaintance, whom he married, and had children by; and died, without any actual revocation of his will: Yet it was determined, that this *total alteration of his circumstances* was an implied revocation. 1 *P. Will.* 304. *Eyre and Eyre.*

So in the case of *Lugg and Lugg*, M. 8 W. Before the delegates. One being single made his will, and devised all his personal estate. Afterwards he married, and had several children, and died without other will or disposition. It was ruled, that there being such an alteration in his estate, and circumstances so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the same mind. 2 *Salk.* 592. *L. Raym.* 441.

And in the case of *Brown and Thomson*, T. 1702. The lord keeper was of opinion, that alteration of circumstances may be a revocation of a will of *lands*, as well as of a personal estate; notwithstanding the statute, which doth not extend to an implied revocation. 1 *Abr. Cas. Eq.* 413.

IV. Of the probate of wills, and administration of intestates effects.

Which chapter divides itself into two parts; viz.

I. Of the probate of wills.

II. Of the administration of intestates effects.

And,

I. Of the probate of wills.

1. **I**T appears to have been a matter of great controversy, to whom the probate of wills and granting administration did originally belong, and whether these were matters intirely of ecclesiastical cognizance; but it seems now to be the better opinion, that the probate of testaments did not originally belong to the ecclesiastical jurisdiction, but to the county court, or to the court baron of the respective lord of the manor where the testator died, as all other matters did. *2 Bac. Abr.* 398. Origin of the jurisdiction.

The truth is, there were wills before there was any ecclesiastical jurisdiction; and consequently, the cognizance thereof pertained then solely to the civil magistrate. After the establishment of christianity and of the ecclesiastical jurisdiction in England, until the time of the conquest, the courts ecclesiastical and temporal were conjoined, the bishop and earl sitting together for the transaction of business in the county court. Upon the separation of the courts in the time of king William the first, it doth not appear unto which of the two jurisdictions the cognizance of wills immediately acceded. But so early as the reign of king Henry the first, Sir Henry Spelman observes, that in Scotland the cognizance of wills belonged to the ecclesiastical jurisdiction; and he adds, doubtless then also in England. And Glanvil doth testify thus much in the time of king Henry the second; who saith, that if there be any dispute concerning a testament, the same is to be heard and determined in the court christian. *Spelm. Rem.* 132.

And in the preamble of the statute of the 18 Ed. 3. ft. 3. c. 6. it is expressed, that *causes testamentary notoriously pertain to the cognizance of holy church.*

Nevertheless, from the constitutions and laws which were made of ancient time against lords of manors detaining the goods of the deceased in prejudice of their creditors, of their families, and of their souls; it seemeth that the lords of manors did for some time retain a jurisdiction with respect to the goods of their deceased vassals. And from this source possibly may be deduced the power of granting probate of wills and administration of intestates effects that still remaineth in divers manors.

nors. Which power having been enjoyed time out of mind, and without interruption, is allowed to be good. And where the lord of a manor hath the probate of testaments within his manor, if such will be proved in the ecclesiastical court, a prohibition lieth; because the jurisdiction thereof belongeth to another: else the party might be doubly vexed. *5 Co. 73. 2 Bac. Abr. 402.*

But, excepting in such like particular cases, it is now certain, however it might have been formerly, that the spiritual court is the only court that hath jurisdiction of the probate of wills; and, as incident to such jurisdiction, hath power to determine all those matters that are necessary to the authenticating thereof. *2 Bac. Abr. 398.*

And the reason why the probate of testaments hath been given unto spiritual men is, because it is to be intended, that they have more knowledge what is for the profit and benefit of the soul of the testator, than laymen have; and that they will look more than laymen, that the debts of the deceased be paid and satisfied out of his goods, and that they will see his will performed, so far as his goods will extend. *Perk. 213.*

Bishop.

2. And, generally, the person before whom the testament is to be proved is the bishop of the diocese where the testator dwelled, or his officer. *Swin. 427.*

Archdeacons, as such, have no power to grant probate or commit administration, altho' most archdeacons in England do it; but they do it not as archdeacons, but by a prescriptive right. *Gibf. 478.*

Peculiar.

3. But there are also certain peculiar ecclesiastical jurisdictions, where by prescription or composition, or other special title, the probation and approbation of the testaments of such as dwell and die within those places, doth appertain to the judge of that peculiar. *Swin. 427.*

Concerning which it is ordered by *Canon 126*, as followeth: Whereas deans, archdeacons, prebendaries, parsons, vicars, and others exercising ecclesiastical jurisdiction, claim liberty to prove last wills and testaments of persons deceased within their several jurisdictions, having no known or certain registers, nor publick place to keep their records in, by reason whereof many wills rights and legacies, upon the death or change of such persons and their private notaries, miscarry and cannot be found, to the great prejudice of his majesty's subjects; we therefore order and enjoin, that all such possessors and exercisers of peculiar jurisdiction, shall once in every year exhibit into the publick registry of the bishop of the diocese, or of the dean and chapter, under whose jurisdiction the said peculiars are, every original testament of every person in that time deceased, and by them proved in their several peculiar jurisdictions, or a true copy of every such testament, examined, subscribed and sealed by the peculiar judge and his notary. Otherwise if any of them fail so to do, the bishop of the diocese or dean and chapter, unto whom the said jurisdictions do respectively belong, shall suspend the said parties and every of them from the exercise of all such peculiar jurisdiction, until they have performed this our constitution.

Archbishop's
prerogative
in case of
bona nota-
bilia.

4. All testaments are proved and administrations granted in the prerogative court of the several archbishops respectively, where the party dying

dying within the province of such archbishop hath bona notabilia in some other diocese than where he dieth. 4 Inst. 335.

And this power is reserved in the statute of frauds and perjuries; by which it is provided, that *nothing in the said statute shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the prerogative court of the archbishop of Canterbury and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before in every respect: subject nevertheless to the rules and directions of the said act.* 29 C. 2. c. 3. s. 24.

And by the statute of the 23 H. 8. c. 9. (which directeth that persons shall not be cited out of their proper diocese) it is enacted, that *the same shall not extend to the prerogative of the archbishop of Canterbury, for calling any person out of the diocese where he shall be inhabiting, for probate of any testament; nor shall be in any wise prejudicial to the archbishop of York, concerning probate of testaments within his province and jurisdiction, by reason of any prerogative.* s. 5, 7.

The law concerning this matter is, that five pounds is the sum or value of notable goods. But where by composition or custom in any county, bona notabilia are rated at a greater sum, the same is to continue unaltered: as in the diocese of London, it is ten pounds by composition. 4 Inst. 335.

If he who dieth had goods in both dioceses, to the amount of 5l in the whole; the same shall be bona notabilia, and consequently under the archbishop's jurisdiction. 1 Roll's Abr. 908, 909.

Rolle says, If a man dieth in one diocese, not having any goods there, but had bona notabilia in another diocese; this shall be sufficient bona notabilia for the archbishop to grant administration: because the ordinary where he dieth, by the law is to take as great care of the testator and of his goods, as the other ordinary where the goods are. And he saith, Mr Selden told him, that he had been informed by those of the court christian, that this is the usual course there. 1 Roll's Abr. 909.

But if a man die upon a journey, the goods that he then hath about or with him, shall not be as bona notabilia, to cause administration to be committed or the will to be proved in the prerogative. Swin. a. 438, 439.

By the statute of the 4 An. c. 16. *Whereas great trouble and expence is frequently occasioned to the widows and orphans of persons dying intestate to monies or wages due for work done in her majesty's yards and docks, by disputes happening about the authenticity of granting probate of the wills and letters of administration of the goods and chattels of such persons; for the preventing thereof, it is enacted, that the power of granting probates of the wills and letters of administration of the goods and chattels of such persons is hereby declared to be in the ordinary of the diocese or such other persons to whom the ordinary power of probate of wills or granting letters of administration do belong, where such persons shall respectively die; and that the wages or pay due from the queen to such persons for work done in any of the*

yards or docks, shall not be taken or deemed to be bona notabilia whereby to found the jurisdiction of the prerogative court. f. 26.

Debts owing to the testator are bona notabilia, as well as goods in possession. 1 Roll's Abr. 909.

And they shall be bona notabilia in that diocese where the bonds or other specialties be, and not where the debtor inhabits. 1 Roll's Abr. 909.

But if the debts be only by contract, without specialty; then they are to be esteemed bona notabilia in that place where the debtor is. Went. 46.

Judgments obtained in the courts at Westminster, upon actions laid in the country, are bona notabilia, not where the action was laid, but where the judgment was obtained, because the record is there. Carth. 148.

E. 12 W. Hilliard and Cox. In debt by an administrator on an administration committed by the bishop of London, the defendant pleaded in bar, that the intestate at the time of his death was resident in another diocese. And it was held good upon demurrer. And by the court; The simple contract debts are personal, and administration must be committed of them where the party dies. And if a man have two houses in several dioceses, and lives most at one, but sometimes goes to the other, and being there for a day or two dies; administration of his personal estate shall be granted by the bishop of this diocese, for he was commorant there, and not there as a traveller. 1 Salk. 37.

A bill of exchange shall be said to be bona notabilia where the debtor is, and not where the bill is; for it is no specialty in law: for if an executor pays debts upon simple contract, or suffers judgment to pass against him; in such actions he may plead such payment or judgment in bar to an action upon a bill of exchange. 3 Salk. 164. Freeman and Bradshaw.

In case lands be given to executors for payment of debts or legacies; it seemeth that this shall not be bona notabilia, altho' it be assets. Went. 46.

Where one dies possessed of goods in London and Dublin; in that case the resolution seems to have been, that the archbishop of Canterbury by his prerogative was to grant administration of the goods in London, and the archbishop of Dublin for those in Dublin. Gibb. 472.

In case one have bona notabilia both in the province of Canterbury and in the province of York; the will must be proved either before both metropolitans, if within each of their jurisdiction there be bona notabilia in divers dioceses; or else, if there be not so in any of the places, then before the particular bishops in those several dioceses where the goods are. Went. 46.

Or, if within the one jurisdiction metropolitan the testator had goods in divers dioceses, and in the other but in one diocese; then in the one place is the will to be proved before the archbishop, and in the other place before the particular bishop, as it seemeth. Went. 47.

Where one dies possessed of goods in the diocese of an archbishop, and in a peculiar of the same diocese; there shall be several administrations, and the archbishop shall have no prerogative, because the peculiar was first derived out of his jurisdiction. *Gibf. 472. Cro. El. 719.*

But where one dies possessed of goods in several peculiars within the same diocese; in that case administration shall not be granted by the bishop of the diocese, but by the metropolitan; inasmuch as they are exempt from ordinary jurisdiction. *Gibf. 472. Swin. a. 440.*

By Canon 92. Forasmuch as many heretofore have been by apparitors led of inferior courts and of the courts of the archbishop's prerogative much distracted; and diversely called and summoned for probate of wills or to take administrations of the goods of persons dying intestate, and are thereby vexed and grieved with many causeless and unnecessary troubles molestations and expences; we constitute and appoint, that all chancellors, commissaries, or officials, or any other exercising ecclesiastical jurisdiction whatsoever, shall at the first charge with an oath all persons called, or voluntarily appearing before them, for the probate of any will, or the administration of any goods, whether they know, or (moved by any special inducement) do firmly believe, that the party deceased (whose testament or goods depend now in question) had at the time of his or her death, any goods or good debts, in any other diocese or dioceses or peculiar jurisdiction within that province, than in that wherein the said party died, amounting to the value of 5 l. And if the said person cited or voluntarily appearing before him, shall upon his oath affirm, that he knoweth, or (as aforesaid) firmly believeth, that the said party deceased had goods or good debts in any other diocese or dioceses or peculiar jurisdiction within the said province to the value aforesaid, and particularly specify and declare the same; then shall he presently dismiss him, not presuming to intermeddle with the probate of the said will, or to grant administration of the goods of the party so dying intestate. Neither shall he require or exact any other charges of the said parties, more than such only as are due for the citation and other precesses had, and used against the said parties, upon their further contumacy; but shall openly and plainly declare and profess, that the said cause belongeth to the prerogative of the archbishop of that province; willing and admonishing the party to prove the said will, or require administration of the said goods, in the court of the said prerogative, and to exhibit before him the said judge the probate or administration under the seal of the prerogative, within forty days next following. And if any chancellor, commissary, official, or other exercising ecclesiastical jurisdiction whatsoever, or any their register shall offend herein; let him be ipso facto suspended from the execution of his office, not to be absolved or released until he have restored to the party all expences by him laid out contrary to the tenor of the premisses: and every such probate of any testament, or administration of goods so granted, shall be held void and frustrate to all effects of the law whatsoever. Furthermore, we charge and injoin, that the register of every inferior judge do, without all difficulty or delay, certify and inform the apparitor of the prerogative court, repairing unto him once a month and no oftener, what executors or administrators have been by his said judge for the incompetency of his own jurisdiction dismissed to the said prerogative court within the month next before; under pain of a month's suspension

pension from the exercise of his office for every default therein. Provided that this canon or any thing therein contained, be not prejudicial to any composition between the archbishop and any bishop or other ordinary, nor to any inferior judge that shall grant any probate of testament or administration of goods to any party that shall voluntarily desire it, both out of the said inferior court, and also out of the prerogative. Provided likewise, that if any man die in itinere, the goods that he hath about him at that present shall not cause his testament or administration to be liable unto the prerogative court.

Shall be held void and frustrate] In the case of *Smith and Bingham*, it was declared, that administration committed by the archbishop by his prerogative, to one who did not die possessed of goods in divers dioceses, was merely void; which declaration was repeated in the case of *Turner and Vansdal*: But the more current doctrine is, that such administrations are not void, like those granted by a bishop, where are bona notabilia, but only voidable by sentence; because the metropolitan hath jurisdiction over all the dioceses in his province, whereas a bishop can by no means have jurisdiction in another diocese. *Gibf.* 472.

In the case of *Sir Richard Rains* and the commissary of *Canterbury*, H. 1. *An.* it was said, that if administration be committed in a diocese where there are bona notabilia, tho' such grant be ipso facto void, yet they do not grant a new administration in the prerogative court, before they repeal that; and in that case they shall not be prohibited. 7 *Mod.* 146.

And by Canon 93. Furthermore, we do decree and ordain, that no judge of the archbishop's prerogative shall henceforward cite or cause to be cited ex officio any person whatsoever to any of the aforesaid intents, unless he have knowledge that the party deceased was at the time of his death possessed of goods and chattels in some other diocese, or dioceses, or peculiar jurisdiction within that province, than in that wherein he died, amounting to the value of 5*l* at the least: decreeing and declaring, that whoso hath not goods in divers dioceses to the said sum or value, shall not be accounted to have bona notabilia. Always provided, that this clause here, and in the former constitution mentioned, shall not prejudice those dioceses where by composition or custom bona notabilia are rated at a greater sum. And if any judge of the prerogative court, or any his surrogate, or his register or apparitor, shall cite or cause any person to be cited into his court, contrary to the tenor of the premisses; he shall restore to the party so cited all his costs and charges, and the acts and proceedings in that behalf shall be held void and frustrate. Which expenses, if the said judge or register or apparitor shall refuse accordingly to pay; he shall be suspended from the exercise of his office, until he yield to the performance thereof.

Are rated at a greater sum] One of the sums mentioned by *Lindwood*, under which nothing should be reputed bona notabilia, is 23*l.* 3*s.* 0*d.* And *Plowden* fixes the sum at 10*l.*; of which *Swinburne* saith, that it seemed to him to be the opinion most commonly received. *Gibf.* 472.

The probate of every bishop's testament, or granting of administration of his goods, altho' he hath not goods but within his own jurisdiction, doth belong to the archbishop. 4 *Inst.* 335.

5. If there be a new and uninhabited country, found out by English subjects, as the law is the birth-right of every subject, so wherever they go, they carry their laws with them; and therefore such new found country is to be governed by the laws of England; tho' after such country is inhabited by the English, acts of Parliament made in England, without naming the foreign plantations, will not bind them: for which reason, it has been determined, that the statute of frauds and perjuries, which requires three witnesses to a will, and that these should subscribe in the testator's presence, doth not bind *Barbadoes*. But where the king of England conquers a country, it is a different consideration; for there the conqueror, by sparing the lives of the people conquered, gains a right and property in such people; in consequence of which, he may impose upon them what laws he pleases. 2 *P. Will.* 75.

Wills in the
British colo-
nies.

By the statute of the 25 G. 2. c. 6. for avoiding doubts concerning who shall be deemed legal witnesses to wills (which is inserted before under the head *concerning the qualification of the witnesses*)—"Whereas in some of the British colonies or plantations in America, the act of the 29 C. 2. has been received for law, or acts of assembly have been made whereby the attestation and subscription of witnesses to devises of lands tenements and hereditaments have been required; therefore to prevent doubts which may arise in relation to such attestation, it is enacted, that this act shall extend to such of the said colonies and plantations, where the said act of the 29 C. 2. is by act of assembly made, or by usage received as law, or where by act of assembly or usage the attestation and subscription of a witness or witnesses are made necessary to such devises; and shall have the same force and effect in the construction of, or for the avoiding of doubts upon, the said acts of assembly, and laws of the said colonies and plantations, as the same ought to have in the construction of, or for the avoiding of doubts upon the said act of the 29 C. 2. in England.—Provided, that no devise or legacy shall be made void by this act, unless the will whereby such devise or legacy shall be given, shall be made after March 1st, 1753."

An estate in the plantations is testamentary, and assets to pay debts: for if the executor hath goods of the testator in any part of the world, he shall be charged in respect thereof. 6 *Co.* 46. 2 *Ventr.* 358.

An appeal from decrees made in the plantations, lies only to the king in council. 2 *P. Will.* 261.

6. Wills only concerning goods and chattels are under the cognizance and direction of the ecclesiastical laws. *Gibb.* 463.

Wills of lands
not subject
to the ecclesi-
astical jurif-
diction.

And the probate of testaments concerning lands only, and no goods contained therein, ought not to be in the spiritual court; and if there be a suit to compel to have the probate of such testaments, a prohibition lieth. *Cro. Car.* 396.

But where a will is concerning lands and goods, and so is a mixt will; the probate thereof shall be intire in the spiritual court, and ought not to be of parcels: but the probate of the will for the land will not prejudice the heir; for it shall not be evidence at the common law; nor the witnesses being there examined, shall such examinations be given in evidence at the common law. *Cro. Car.* 396.

And

And where a will doth contain in it lands and goods; generally, the courts temporal will not grant a prohibition to stay the probate thereof for the whole: but if in a special case, it be alledged, that the testator was of non-sane memory, or the like; a prohibition will be granted for the whole. For if the spiritual court should be suffered to proceed, and prove the will there, and allow it there, for the personal estate; it would be an evidence to induce the jury, upon a trial at law, to pass for the will as to the lands and tenements. *E. 12 J. Egerton and Egerton.* Cro. Jac. 346.

Will of goods
not effectual
before pro-
bate.

7. But a devise of a personal estate is not looked upon to be of any effect until probate is made of the will by the executor; neither can an executor or other person give a will in evidence concerning a personal chattel without producing the probate; for this will is no will until it has received a sanction, or an allowance of it in the spiritual court; for they are to judge whether it be a will or not; and the temporal courts are not to look upon it as a will till probate be made: And in an action of trover for goods which a testator gave to his sister in his life time, brought against his executor for them, who would have given in evidence a former will, to have shewn that he had no power to give those goods; this was refused, because he ought to have produced the probate. *Chaunter and Chaunter*, 1708. Viner. *Executors*. A. 2. 20.

Refusal of an
executorship.

8. He that is named executor cannot be precisely compelled to stand to the will, and undertake the executorship, unless he have already meddled with the goods of the testator as executor; for then, he is not only to be compelled to perform the office of an executor, but also if he should refuse, and the ordinary commit the administration unto him, this refusal is void, and he shall be charged as executor. *Swin.* 384.

Therefore if the executor named in the testament resolve not to stand to the executorship, but to refuse the same; then must he be ware that he do not administer the goods of the deceased as executor; for having once administered as executor, he may at any time after be compelled to undergo the burden of an executor, and also may be sued as executor by the creditors of the testator; tho' he cannot sue others as executor, for that he hath not the will under the ordinary's seal. *Swin.* 469.

And a person is then said to administer as executor, so as thereby he may be compelled to stand to the executorship, when he doth perform those acts which are proper to an executor; as to pay the debts due by the testator, or to receive any debts due unto the testator, or to give acquittances for the same, with other such like acts. *Swin.* 469.

But if a man do those acts which are not proper to an executor, he is not said to have administered as executor to the effect aforesaid; as, to feed the cattle of the deceased, lest they should perish; or to take into his custody the goods of the deceased, to the end they may be safe from being stolen or purloined; or to dispose of the testator's goods about the funeral: for these be deeds of charity common to every christian, and not peculiar to an executor. Likewise, to make an inventory of the goods of the deceased, is not to administer as executor; or

to deliver to the wife her convenient apparel; or to take the testator's horse and ride him, or to use him as his own, supposing him not to be the testator's but his own; or to take the goods of the testator by his lawful gift. And generally, whosoever as a mere trespasser entereth on the goods of the testator, whether it be to things living, as horse, kine, sheep, or dead things, as pots, pans, dishes, converting the same to his proper use, and not to the use of the testator, as to the payment of the testator's debts or legacies, doth not administer as executor. *Swin.* 471, 472.

Howbeit, in these cases and such like, whosoever feareth to be adjudged executor administering of his own wrong, the most safe course is, not to meddle at all, but utterly to abstain from all manner of use of the testator's goods; and namely, let him beware that he do not sell any goods, or kill any cattle of the deceased. *Swin.* 472.

Further, altho' a person hath not meddled with the goods of the testator, and is therefore not compellable; yet if a legacy be left to him, he may be compelled to stand to the executorship, or else to lose his legacy. *Gibb.* 469.

The refusal to take upon him the executorship, cannot be by word only; but it must be entred and recorded in court. *Swin.* a. 443.

And when an executor hath once administered, he cannot afterwards refuse to prove the will, and take upon him the executorship; and in that case the ordinary ought not to accept such a refusal, but to compel him to prove the will, and take upon him the executorship. Yet if the judge doth admit one to administer, notwithstanding his having formerly refused, it shall stand good. *Swin.* a. 443.

9. An executor of his own wrong is such as takes upon him the office of an executor by intrusion, not being constituted by the testator or deceased, nor (for want of such constitution) substituted by the ordinary to administer. *Went.* 171. Executor of his own wrong.

If a man gets goods of an intestate into his hands after administration is actually granted, it doth not make him executor of his own wrong; but if he gets the goods into his hands before, tho' administration be granted afterwards, yet he remains chargeable as a wrongful executor, unless he delivers the goods over to the administrator before the action brought, and then he may plead plene administravit. *1 Salk.* 313.

An executor of his own wrong cannot bring an action; for he cannot shew the testament containing his name, as he ought. *Br.* Administrator. 8.

Neither can he retain for his own debt or legacy. *Mo.* 527. *Poph.* 125.

But he renders himself liable to the action, not only of the right executor, but also to the suits of the testator's creditors; yet only so far, as the goods which he so wrongfully administered amount unto. *Swin.* 339. *Harr. Justin.* 87. *Viner.* Executors. E. a. 4, 5.

So also, it is said, he shall be sued for legacies, as well as a lawful executor. *Noy.* 13.

But if he doth lawful acts with the goods, as paying of debts in their degrees, it shall alter the property against the lawful executor; as if he pay just and honest debts, the rightful executor shall not avoid that payment. It is true, the rightful executor may maintain against him an action of trover; but he shall only recover in damage so much as the wrongful executor hath misapplied. By Holt chief justice. 12 *Mod.* 471.

But Mr Wentworth is of opinion, that albeit such payment shall stand good as against other creditors, yet it is not good as against the rightful executor or administrator: for then any stranger might usurp the office of executor, and take from him that liberty and election, to prefer which creditor he will in first payment; yea, might take from the executor power to pay himself before others, in case there were a debt due to him, which would be unreasonable. *Went.* 182.

And as he himself is liable to the suit of the lawful executor, creditors, or legatees; so also, in case of his death, are his executors or administrators liable, by the statute of the 30 C. 2. c. 7. altho' in other cases, a personal wrong dieth with him that did it. And altho' he hath obtained probate, yet if upon appeal such probate shall be annulled and made void, acts done by him, pending the appeal, shall not be good. As in a case, *M. 5 An.* In the common pleas. An action was brought by the plaintiff, as executor, for money due from the defendant to his testator. The defendant pleads, that another person was appointed executor to the testator, and proved his will, and that he the defendant had paid him part of the money in satisfaction of the whole, and that the said person on receipt thereof discharged the defendant. The plaintiff replied, that the probate granted to the other person was afterwards upon appeal annulled by sentence in the ecclesiastical court, and the will by which he was made executor adjudged to be forged, and the will by which the plaintiff is appointed executor allowed. On demurrer, the question was, whether payment to one who was executor de facto, and had probate of the will, was good to bind the rightful executor. And the court gave judgment, that it was not. And by Trevor chief justice: An executor derives all his authority from the testator himself; and, as executor, without any thing more, he has the power of disposing of the estate of the testator, of releasing a debt due to the testator, and the like. True it is, before an action brought, a probate is necessary; but that is only requisite to ascertain the court that the plaintiff is executor and has a right to bring his action, not to give the plaintiff any title or interest to the estate of the testator. If the testator appoints no executor, or dies intestate, the administrator is appointed by the ordinary, and derives his authority from him; and therefore if administration is granted, all acts by him as long as the administration continues in force are good, and even tho' it be afterwards repealed. But there is a difference taken (6 Co. 18.) when an administration is repealed upon a citation, or upon an appeal. If it is upon an appeal, which suspends the administration, all acts after such suspension are void: If it is repealed upon a citation, all the acts of the administrator, till the repeal, are good; for by the citation the grant of the administration is

not suspended; therefore if the administration be repealed, all acts done by an administrator, which a rightful administrator might have done, shall be allowed, for in them he acted in the place of the rightful administrator. But it is otherwise in the case of an executor; for the probate of the will gives no authority at all to him; and therefore if he is not the rightful executor, he has no authority; and it would be unreasonable, that a person who has no authority should dispose of the interest of another. The rightful executor has not only a trust or authority to administer the goods of the testator, but also an interest annexed to the trust. And therefore the property of all the goods, after administration, is completely vested in him. And consequently, the disposition by another person of the goods of the testator, or release of his debts, is a disposition of the interest of the rightful executor, and therefore such disposition doth not bind him. And this case is not like the case of an officer, who officiated without legal authority, as the deputy of the deputy of a steward; for rightful acts done by him are good: for he is an officer de facto, and in the immediate and open execution of his office, and the parties did not know whether he had authority or not.— And he said, in this case of an executor some mischief indeed may possibly happen; but it would be a more general inconvenience, if a wrongful executor should be allowed to dispose of the right and interest of a rightful executor. *Comyns. 150. Anonym.*

10. Where there are divers executors named in the will, and some of them do refuse, and others of them prove the testament; they who refuse may after at their pleasure administer, notwithstanding such refusal before the ordinary. 9 Co. 37. *Bacon's Use of the Law, 161. Perk. 212.*

And this is what in the spiritual court is called a double probate; which is in this manner: The first that comes in, takes probate in the usual form, with reservation to the rest. Afterwards, if another comes in, he also is to be sworn in the usual manner, and an ingrossment of the original will is to be annexed to such probate in the same manner as the first; and in the second grant, such first grant is to be recited. And so on, if there are more that come in afterwards.

For notwithstanding their refusal at first, they still continue executors; and at any time during the lives of their companions, they may prove the will, they may pay debts, make releases, and they must be joined in all suits where the co-executors are plaintiffs, because they are all privy to the will; but not where they are defendants, because the plaintiff in the action is not bound by law to take notice of any but those who have proved the will. *Swin. a. 444.*

For the king's courts have always used to allow the probate of some of the executors, to enable them all to sue actions: so that the probate of the testament doth not give to them any interest or title either to things in action or in possession, for they have all their title and interest by the testament, and not by the probate: but yet without the probate, the judges allow them not to sue actions. 9 Co. 38.

It is holden, that he which did refuse the executorship, cannot assume that office after the death of his fellow executor. *Swin.* 326, 418.

But in the case of *Houfe* and *Lord Petre*, Dec. 19. 1700. Before the delegates: The common lawyers held, that if one executor refuseth before the ordinary, and the rest prove the will, yet at common law, he who refused may at any time come in and administer; and tho' he never acted whilst his companions were living, yet after their death he shall be preferred before any other executor made by a co-executor; altho' the civilians held, that by their law the renunciation was peremptory. *1 Salk.* 311.

Where one executor excludes the other.

11. If a man maketh two executors and dieth, and one of them proveth the will in the name of them both, against the will of the other; this is not any administration for him who consented not to the probate: but he may plead *ne unque executor*; for the probate maketh him not executor, if he doth not administer. *1 Roll's Abr.* 918.

Where all refuse; administration to be committed.

12. Swinburne says, when all the executors named in the testament do refuse; it is lawful for the bishop or ordinary to commit administration, and to annex the will to the letters of administration; and the administrators shall have action, and may administer the goods of the deceased, as if he had died intestate; and their authority or act done is good and effectual in the law in the mean time, until the executors undertake the executorship; for then the ordinary may revoke the administration before by him committed. *Swin.* 380, 383. *1 Roll's Abr.* 907.

So also if a man make an executor, but this is not known, or is concealed; the ordinary may grant administration, and this shall be good until the other prove the will. *1 Roll's Abr.* 907.

And so in like manner, if the person be disabled to be executor, or no executor at all be named in the will. *Swin.* 380.

But (lord Coke says) if they all refuse before the ordinary, and the ordinary commit administration to another, there they cannot administer afterwards. *9 Co.* 37.

And by lord chancellor *Talbot*, in the case of *Robinson* and *Pett*, E. 1734: Where there are two executors, and one renounces, he is still at liberty, whenever he pleases, to accept of the executorship; otherwise, if both renounce, and the ordinary commits administration to another. *3 P. Will.* 251.

Within what time the will shall be proved. What the executor may do before probate.

13. Regularly [that is, by the civil law], testaments ought to be insinuated to the official or commissary of the bishop of the diocese, within four months next after the testator's death. *Swin.* a. 447.

14. And executor, for goods of the testator taken from him, or a trespass done upon the lease land, or a distraining or impounding of goods or cattle, may maintain, before the will be proved, actions of trespass, or replevin, or detinue; for these actions arise upon the executor's own possession. *Went.* 34.

But before the proving of the will, an executor cannot maintain a suit or action of debt, or the like: and the reason is, for that therein he must

must shew forth the will proved under the seal of the ordinary. *Went.*

34. And in general, an executor is a compleat executor before probate, to all purposes but bringing of actions; so that he may release an action, assent to a legacy, may be sued, may alien or otherwise intermeddle with the goods of the testator. 1 *Salk.* 301.

For by administering, the executor hath accepted of and taken upon him the whole administration before the probate; and is thereby intitled to receive all debts due to the testator; and all payments made to him are good, and shall not be defeated, altho' he should die and never prove the will. 1 *Salk.* 306, 307.

Also the executor may, in convenient time after the testator's death, enter into the house descended to the heir, for the removing and taking away of the goods, so as the door be open, or at least the key be in the door: and this seemeth to be understood of the door of each room. For altho' the door of entrance into the hall and parlour be open, the executor cannot by that justify the breaking open of the door of any chamber, to take the goods there; but only may take those in the rooms which be open. And this seemeth to be proved by the case of the chest with evidences; which it is said, the executor may take, and put out the deeds, delivering them to the heir, that is to say, the chest being unlocked. Now a chamber or other room within a house locked is an inclosure of better respect than a chest. But if the goods be not removed within convenient time, the heir may distrain them as damage feasant. *Went.* 92.

T. 5 *Ja. Stodden and Harvey.* Trespass: Upon demurrer, the case was; Lessee for life of a house and pasture land dies; his executors suffer his cattle to go there for six days after his death, and then removed them; and in trespass, justify for that time: averring, that in that time of six days they could not procure any other land or place to put in the cattle. Whereupon it was demurred. And whether that were a convenient time to remove them was the question. And the court seemed to incline, that six days is but a convenient time for the removing of their cattle; and the law allows a convenient time for their removing, especially it being averred, that they had not any other place to remove them unto. But for a fault in the plea, wherein he pleaded a lease of the house, but not of the land in the declaration mentioned, it was adjudged for the plaintiff. *Cro. Ja.* 204.

In like manner, the executor before probate may be sued for the debts of the testator; unless he refused the executorship in due manner, so as administration may be granted, and so there be somebody suable for the testator's debts. *Wentw.* 36.

So a bill for discovery of effects may be brought before probate: As in the case of *Dulwich college and Johnson*, E. 1688. A bill for a discovery of the personal estate was brought before the will was proved, the will being controverted in the spiritual court. And this was pleaded to the bill; but overruled: a discovery being for the benefit of all persons

sons interested, and necessary for the preservation thereof. And such discoveries have often been ordered, *pendente lite* in the spiritual court. 2 *Vern.* 49.

And in the case of an administrator, a court of equity will allow of a bill brought by an administrator before administration is actually taken out: As in the case of *Fell* and *Lutwidge*, Feb. 3. 1740. The widow brought a bill for recovery of the effects of her late husband, and did not take out administration till after the bill brought. It was objected, that the bill was brought too early. By the lord chancellor Hardwicke: It is very true, that this would have been an exception in an action at law; but it is not so to a bill brought in this court. And the exception was over-ruled. *Barnard. Cha. Ca.* 320.

Ordinary to
cite the exe-
cutor to prove
the will.

15. By the 21 H. 8. c. 5. *The ordinary, or other person having authority for probate of testaments, may convent before them persons named executors of any testament, to the intent to prove or refuse the testament, as they might do heretofore.*

And by the 1 Ed. 6. c. 2. *All summons and citations or other process ecclesiastical, in all causes of probates of testaments, and commissions of administrations of persons deceased, shall be made in the name and with the stile of the king, as it is in writs original or judicial at the common law; and the teste thereof shall be in the name of the archbishop or bishop or other having ecclesiastical jurisdiction; and the commissary, official, or substitute exercising jurisdiction under him, shall put his name in the citation or process after the teste. f. 3.*

And the ordinary may sequester the goods of the deceased, until the executors have proved the testament: so may the metropolitan, if the goods be in divers dioceses. *Swin. a.* 477, 478.

And if the executors do not appear upon the process, the ordinary may excommunicate them. But they may pray time to advise; and the ordinary may grant in the mean time letters *ad colligendum bona defuncti*. *Treatise of Eq.* 109.

Mandamus to
compel the
ordinary.

16. On the other hand (inasmuch as the executor, tho' he may be sued, and pay debts, and release an action, yet cannot have an action, before probate) the ordinary is bound to prove the will; and if the executor accept, and desire probate, and is refused by the ordinary, a writ will go from the temporal courts, to compel him to proceed to probate, where the will is not controverted; and that, notwithstanding an appeal to the delegates, as it was in the case of *Dunkin* and *Mun*, *M.* 26 C. 2. in which such writ was granted to the prerogative court. *Gibb.* 469.

Manner of
proving the
will.

17. The manner and form of proving testaments, is of two sorts: the one is called the vulgar or common form; the other is termed the solemn form, or form of law. *Swin.* 448.

The vulgar or common form is more compendious or brief than the other: for after the death of the testator, the executor presenteth the testament to the judge; and in the absence, and without citing or calling of such as have interest, produceth witnesses to prove the same; who

who testifying upon their oaths viva voce, that the testament exhibited is the true whole and last testament of the party deceased, the judge doth thereupon (and sometimes upon lesser proof) annex his probate and seal to the testament, whereby the same is confirmed. *Swin.* 448.

Where a witness hath a legacy in the will, it hath been usual at the time of proving the will, and before administering the oath to him, to exhibit his release or renunciation of the legacy under his hand and seal, and to leave the same with the register. *1 Ought.* 327.

It is not necessary to the proof of a written will, that the witnesses hear it read, so as they can depose that the testator declared before them, that the self same writing now produced is or was his last will and testament. *God. O. L.* 66.

In proving a devise of lands, the proper way is, that the witness should not only prove the executing the will by the testator, and his own subscribing it in his presence; but likewise that the rest of the witnesses subscribed their names in the testator's presence: and so one witness proves the full execution of the will. *1 P. Will.* 741.

E. 12 G. 2. Croft and Paulet. On a trial at bar in ejectment, the defendant made title under a will, the attestation of which was in these words, *signed, sealed, published, and declared, as and for his last will and testament, in the presence of us A, B, and C.* The will was in 1723, and the witnesses were all dead, and their hands proved in common form. But then it was objected, that this was not an execution according to the statute; and the hands of the witnesses could only stand as to the facts they had subscribed to, and signing in the presence of the testator was not one. But the court, on the authority of a case in the common pleas, said it was evidence to be left to a jury of a compliance with all circumstances. And a verdict was given for the will. *Str.* 1109.

Generally, by the civil law, the testimony of two witnesses is required; and if in the probate of a will, the testimony of one witness is disallowed in the ecclesiastical court, a prohibition lieth not: for that court having jurisdiction of the matter, hath it also as to the manner of proof and proceedings. *2 Roll's Abr.* 300.

But Dr Godolphin says, where there is no controversy or dispute touching the will, there the single oath of the executor alone is sufficient for the probate thereof in common form. *God. O. L.* 65.

And this, it is said, is the practice throughout the province of Canterbury. But within the province of York, one witness to the will is also sworn.

When the testament is to be proved in *form of law*, it is requisite that such persons as have interest, that is to say, the widow and next of kin to the deceased, to whom the administration of his goods ought to be committed if he had died intestate, are to be cited to be present at the probation and approbation of the testament; in whose presence the will is to be exhibited to the judge, and petition to be made by the party which preferreth the will, and enacted for the receiving swearing and

examining of the witnesses upon the same, and for the publishing or confirming thereof: whereupon witnesses are received and sworn accordingly, and are examined every one of them secretly and severally, not only upon the allegation or articles made by the party producing them, but also upon interrogations ministred by the adverse party, and their depositions committed to writing: afterwards the same are published; and in case the proof be sufficient, the judge doth by his sentence or decree pronounce for the validity of the testament. *Swin.* 448, 449.

Which difference of form in proving the will, worketh this diversity of effect; namely, that the executor of the will proved in the absence of them which have interest, may be compelled to prove the same again in due form of law; and if the witnesses be dead in the mean time, it may endanger the whole testament, especially if ten years be not past since the probation, whereby necessary solemnities are presumed to have been observed: whereas the testament being proved in form of law, the executor is not to be compelled to prove the same any more; and altho' all the witnesses afterwards be dead, the testament doth still retain its full force. *Swin.* 449.

But probably this word *ten* in figures may have been mistaken for *thirty*; for Dr Godolphin says, The will being proved only in common form, it may be questioned at any time within thirty years next after, by common opinion, before it work prescription. *God. O. L.* 62.

And this proving of the will in solemn form, is for the most part at the instance of some person who desireth to invalidate the same: In which case, his proctor, at the time of exhibiting the will, ought to accept the contents thereof so far forth as it maketh for the benefit of his client; otherwise if any legacy is given to him in the will, he shall lose it for his general impugning of the will. *1 Ought.* 21.

And in such case, where an executor hath been called to prove the will by witnesses, and hath fully proved it; if the party who caused him to do this, shall not, after publishing the attestation, except against the will or the witnesses, nor propose any matter to hinder the passing of sentence for the validity of the will, the judge doth not usually condemn him in costs: But otherwise it is, if he shall propose such matter and fail in the proof; for then he will be condemned in costs, at least from the time of such proposal. *1 Ought.* 20.

But where the parties interested do not call the executor to prove the will in solemn form, yet the executor himself may cause the will to be proved in this manner: As where an executor hath the greatest part of the goods of the deceased bequeathed unto himself, and he doubteth after the witnesses shall be dead, that the wife or children or other kindred of the deceased will contest the validity of the will, he may cite them in special, and all others pretending interest in general, (and so is the usual practice,) to see the will proved by the witnesses; which being done, the will shall not be set aside afterwards (provided there hath been no irregularity in the process) when the witnesses are dead. *1 Ought.* 20.

Where

Where the executor is infirm, or lives at a great distance, it is usual to grant a commission to some grave clergyman in the neighbourhood, to administer the oaths, and perform the other requisites for granting probate of the will. So also in the granting of administrations. 1 Ought. 322.

Besides these forms of proving testaments above recited, which are referred to that kind of probation which is called the publication of the testament; there is yet another form, which is called the opening of the testament, which form doth respect written or closed testaments, in the making whereof the civil law did require that the witnesses should put to their seals; and after the death of the testator, at the opening of the written or closed testament, the same law did also require that the same witnesses should be called by the magistrate to acknowledge their seals, or to deny the sealing. But as we do not observe that solemnity of the civil law in the sealing of the testaments by the witnesses, no more do we observe that solemnity which the civil law requireth in opening of testaments sealed; unless this may seem to have some resemblance with this third form about the opening of the testament, which is enacted by the statute of the 21 H. 8. c. 5. which saith, that *the bishop, ordinary, or other person having authority to take probate of testaments, shall upon the delivery of the seal and sign of the testator, cause the same seal to be defaced, and thereupon incontinent redeliver the same seal unto the executor or executors, without claim or challenge thereunto to be made.* 1. 5. Swin. 450.

Dr Swinburne says, if a testament be made in writing, and afterwards be lost by some casualty; yet if there be two witnesses [that is, in the case of goods and chattels] which did see and read the testament written, and do remember the contents thereof, these two witnesses so deposing of the tenor of the will, are sufficient for the proof thereof in form of law; so that they be otherwise as well in respect of their skill, as of their integrity, greater than all exception, and specially some other likelihoods concurring therewithal to make their testimony more credible. Swin. 450.

If an executor proves a will of a personal estate, wherein one of the legacies is forged, the executor in such case hath no remedy in equity; but ought to have proved the will, with special reservation to that legacy. *Plume and Beale.* 1 Peere W. 388. 2 Vern. 8. 17. In which case, the forgeries are to be decreed against in the ecclesiastical court, and the will ingrossed without them, and so annexed to the probate.

18. By a constitution of archbishop Stratford: *After the testament shall be proved according to custom before the ordinary; the execution or administration of any goods shall not be committed, but to such as shall faithfully promise, to render a just account of their administration, when they shall be thereunto duly required by the ordinary.* Lind. 177.

Executor's oath to render a just account.

Shall faithfully promise] And that by oath, faith Lindwood; which may be before the administration. *Lind.* 177.

And Swinburne says, in what manner soever the testament be proved, the executor before he be admitted by the ordinary to execute, and before he have the will under the seal of the ordinary, is to promise by virtue of his oath, to make a true account when he shall be thereunto lawfully called by the ordinary. *Swin.* 451.

By the ancient canon law, a proctor having a special proxy, might make oath instead of the executor or administrator, and swear upon the soul of his client; but now by Canon 132, it is ordained, that *forasmuch as in the probate of testaments and suits for administration of the goods of persons dying intestate, the oath usually taken by proctors of courts in animam constituentis is found to be inconvenient; therefore from henceforth every executor or suitor for administration shall personally repair to the judge in that behalf or his surrogate, and in his own person (and not by proctor) take the oath accustomed in these cases. But if by reason of sickness or age or any other just let or impediment, he be not able to make his personal appearance before the judge; it shall be lawful for the judge (there being faith first made by a credible person, of the truth of his said hindrance or impediment) to grant a commission to some grave ecclesiastical person, abiding near the party aforesaid, whereby he shall give power and authority to the said ecclesiastical person, in his stead, to minister the accustomed oath abovementioned to the executor or suitor for such administration, requiring his said substitute, that by a faithful and trusty messenger he certify the said judge truly and faithfully what he hath done therein.*

Which oath, to be administered to the executor, is usually in this form: "You shall swear, that you believe this to be the true and last will and testament of *A. B.* deceased; that you will pay all the debts and legacies of the deceased, as far as the goods will extend, and the law shall bind you; and that you will exhibit a true, full, and perfect inventory, of all and every the goods, rights, and credits of the deceased, together with a just and true account, into the registry of the — court of — when you shall be lawfully called thereunto. So help you God."

Bond to the
like purpose.

19. By the same constitution of archbishop Stratford; *after the testament shall be proved according to custom before the ordinary, the execution or administration of any goods shall not be committed but to such as are able, and if need be shall give sufficient security, to render a just account of their administration, when they shall be thereunto duly required by the ordinary.* *Lind.* 177.

And Lindwood hereupon observeth, that it seemeth hereby that the ordinary may remove the executor appointed by the testator, from the administration, especially where there is just cause, as where he cannot give security for a due account. *Lind.* 177.

And Swinburne says, The executor (if it be behoveful) shall enter into bond, to make a true account when he shall be thereunto lawfully called by the ordinary. *Swin.* 451.

But in the case of the *King* and *Sir Richard Raines. M. 10 W.* A mandamus was directed to Sir Richard Raines to command him to grant probate of the will of Edith Pinfold to one Richard Watts, who was made executor of it. Sir Richard Raines makes return to it, and admits, that Edith Pinfold made her will, and Watts executor of it; but says further, that it clearly and judicially was proved and appeareth to him, that Watts is worth nothing, but absconds for debt; and therefore that it is lawful to him to defer the granting of the probate, until Watts find sufficient security to perform the intent of the will. And it was argued by Sir Bartholomew Shower, Mr Montague, and Dr Waller the king's advocate general (a civilian), that this return was good, and that a peremptory mandamus ought not to be granted. And Dr Waller said, that in fact the case was thus: Edith Pinfold made her will, and Richard Watts her nephew her executor, and devised to him 100 l for a legacy, and some cattle; she devised also to Baines her brother 500 l, and the residue of her personal estate to the son of Baines; the will was brought by Baines to the prerogative court to be proved; and it was opposed by one Huntley, but the cause was not promoted at all by Watts; sentence passed in the prerogative court, for Baines; upon which Huntley appealed to the delegates, and the sentence there was confirmed; whereupon the will was returned into the prerogative court, and then Watts claimed probate; but upon examination it appeared to the judge, that he was an insolvent and necessitous man, and had received his legacy, and therefore the judge required caution; upon which Watts obtained this mandamus, and to it the judge made this return, which (by Dr Waller) is good: For if there is any default in the judge in the administration of his office, it is a proper subject for an appeal; for this will, being of chattels, is altogether of ecclesiastical cognizance; and therefore as the spiritual judge shall determine concerning the validity of the will, so he ought to make a judgment, whether he ought to grant probate of it or administration, or if the executorship be conditional, as it may be, whether the condition be performed, or the like; in all which cases, if he makes a false judgment, the proper remedy is by appeal, and not to come in this manner for remedy to the king's bench. He argued further, that the judge hath done nothing in this case but what he ought to do; for in such cases he may properly require caution. In the time of the heathen emperors, the testaments were reposed in the colleges of the *pontifices*; and from the time that the emperors became christian, the bishops were intrusted with them. Now the civil law was, that security should not be demanded *de herede*, which at that time included what we now call executor, unless he was insolvent; and then it was lawful to demand caution or security. But after this, the canon law followed; and then they made use of the word executor, which was before included in the word heir: and of them there are three sorts; first, *legitimus*, to wit, the ordinary; secondly, *datus*, namely, he whom the ordinary appoints, and he always gave security; thirdly, *testamentarius*, who came instead of the heir, which is he whom we call executor by way of pre-eminence. And then, as the heir before, if he

was insolvent, always gave caution; so for the same reason, an insolvent executor always gives caution. To say the truth, there is a difference made, when the testator knew at the time of the making his will, that the person whom he constituted executor was then insolvent, and when the executor is become insolvent by matter *ex post facto*; but at what time Watts became insolvent, doth not appear in this case; and therefore to justify the acting of a judge, the court will intend, if it be material, that he became insolvent since the death of the testatrix, rather than at the time of the will made. In *Lind.* 167. it is said that no religious person shall be executor, unless his superior takes care to give caution for the due execution of the will, and for the loss that may happen by his administration; and Lindwood gives the reason of it, because it appears that such a person is insolvent; which proves that insolvent persons ought to give caution. So *Lind.* 177. before the executor be admitted by the ordinary to execute the will, he ought to take an oath (which is the constant practice, and yet no mention is found of such oath, before that which these constitutions in Lindwood make of it; and yet before the late statute, if quakers refused to take such oath, no probate of any will used to be granted to them)—and *if need be*, says Lindwood, he shall give sufficient caution. To the same purpose Swinburne says, that the executor, if it be behoveful, shall enter into bond. To which Sir Bartholomew Shower added, that if an executor is non compos, the ordinary is not bound to grant probate to him; because he hath an apparent disability to execute the will; which strongly resembles this present case. Also, he said, that if the executor refuses to take the oath, this amounts to a refusal of the office, and the ordinary may grant administration with the will annexed. Why then shall not the refusal to give security, amount to a refusal of the office of executor; since there is no positive law, that in such case the ordinary shall administer an oath, more than in this case that he shall demand caution? Further he said, that altho' mandamus's are granted oftentimes to compel the granting of administration, because they are founded upon the act of parliament which appoints the granting of administrations; yet one cannot find any precedents of mandamus, to compel the judges of the civil law to execute their law, which seems to be the present case.—Against this it was argued by Mr Northey and Mr Eyre, that the prerogative court cannot in such case require caution, for the same reasons that the court afterwards gave for the ground of their judgment, and therefore unnecessary to be repeated.—And by Holt chief justice; Wills and testaments are of ecclesiastical cognizance, not by force of the civil or canon laws (for they bind no farther here, than as they have been received here) but by the law of the land. Then if the ecclesiastical courts proceed to enlarge the power of the judge, contrary to that which the common law allows, the king's bench will prevent all sorts of incroachments. As if an executor be sued in the ecclesiastical courts to make distribution, he not being residuary legatee; tho' that were allowed by the canon law, yet the king's bench would grant a prohibition to stay any such

suit; for all suits for distribution were prohibited by the king's bench, until the statute of the 22 & 23 C. 2. c. 10. made them lawful. Dr Waller has not quoted any canon law, that the ordinary in such case ought to take caution; and the common law will not permit him to exact security, for the insolvency of the executor. For suppose in this case (as the fact is, the executor will not give security, and yet will not renounce the executorship; the ordinary cannot compel him to give security. What must be done? Tho' a refusal of the oath amounts to a refusal of the office of executor (because the oath is allowed by the common law, for it is proper to take a promissory oath, that he will execute the office justly, which he is going to execute) yet the refusal to give security will not amount to a refusal of the office of executor; because it is against common right, to require collateral security. Then the testament will continue in force; the ordinary cannot grant administration with the will annexed; and so there will be a failure of justice, nobody being capable to sue the testator's creditors. One half of what one finds in Lindwood is not the law of the land. And as to the case of religious persons, objected out of Lindwood, he said, that if a monk be made an executor, he cannot accept the office without leave of his superior; and then if the superior gives him leave to be executor, without giving other collateral security, the superior by his leave given is become security; and if the monk commits a *devastavit*, the suit shall be against the abbot and the monk, and the execution will be of the goods of the house.—And Turton justice agreed with Holt chief justice in every thing.—But Rokeby justice seemed to be of opinion, that the grievance in the present case would be properly remedied by appeal. And he said, that in the province of York security was always given upon the granting of the probate of a will, without any dispute made about it. Upon which a day was given to Dr Waller, to certify the king's bench, by producing precedents, whether the practice had been in the prerogative court to take caution in such case. At which day no precedent of it being shewn, nor satisfaction thereof given to the court, Holt chief justice, with the concurrence of the other judges, pronounced the opinion of the court, that a peremptory mandamus ought to be granted in this case; because the ecclesiastical court cannot require caution in this case: 1. For when a man is made executor, nobody can add qualifications to him, other than those which the testator has imposed; but he shall be who, and in what manner, the testator shall judge proper. 2. The executor has a temporal right, of which he is barred by the refusal of the probate, inasmuch as he cannot before probate sue in Westminster hall. 3. There are no precedents in the canon law to warrant this; and the practice has been always contrary. And if any cases happen, in which equity may be requisite, there is another chancel here, where it runs, without resorting to the spiritual court, namely, the chancery. And a peremptory mandamus was granted.—And the reporter says, Mr Robert Eyre told him, that the lord chancellor Somers well approved of this resolution. *L. Raym.* 361.

But

But after all, this adjudication proceeds upon a supposition, that there is no canon law which requireth such caution, and Lindwood's authority alone was not judged sufficient in this case. But the aforesaid constitution of archbishop Stratford is undoubtedly a part of the canon law, which requires that *they shall give sufficient security, if need be*. In the province of York, bond is and hath been always required and given. And in the other province, so far as the aforesaid constitution is in force, they may require it if they shall see cause, as in this case it seemeth that there was very great cause. That no instances could be readily produced, where this had been practised, might be owing partly to the want of reports of cases adjudged in the ecclesiastical courts; or (for any thing which appears from this report) perhaps no further inquiry was made.

And in the case of *Folkes and Docminique*, T. 13 G. 2. where the executor was under the age of 17 years, the court allowed a bond given by the administrator with the will annexed, during the minority of the executor, to be good at common law, and not obtained by coercion. *Str.* 1137.

Probate making out.

20. All this being done, the bishop's officers are to keep the will original, and certify the copy thereof in parchment under the bishop's seal of office; which parchment so sealed is called the will proved. *Bacon's Use of the L.* 160.

Registry of wills in particular places.

21. By the 2 & 3 An. c. 4. In order to render it more easy for the clothiers and others to borrow money upon land security for the promotion of trade, it is enacted, that a memorial of all wills and devises in writing, whereby any honours manors lands tenements and hereditaments, within the *West Riding* of the county of *York*, may be any way affected in law or equity; may at the election of the party or parties concerned, be registred in such manner as by the said act is directed: and every devise by will of the honours manors lands tenements or hereditaments, or any part thereof, contained in any memorial so registred as aforesaid, that shall be made and published after the registering of such memorial, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration; unless a memorial of such will be registred as aforesaid. But this not to extend to copyhold estates, nor to leases at rack rent, nor to any lease not exceeding twenty one years where possession goeth along with it.

By the 5 An. c. 18. there are some further regulations concerning the same.

The statute of the 6 An. c. 35. containeth regulations to the like purpose for the *East Riding* of the said county of *York*: Which same regulations are also extended to the *West Riding*, in aid of the two former acts.

By the 7 An. c. 20. The like for the county of *Middlesex*.

By the 8 G. 2. c. 6. The like for the *North Riding* of the said county of *York*.

And

And by the 25 G. 2. c. 4. Further regulations with respect to the county of *Middlesex*.

22. The probate of a will, or a copy of the will out of the register of the spiritual court, are not to be allowed as evidence in the case of lands. *Dike and Polbil. L. Raym. 744.* Probate of a will of lands, not evidence.

H. 7 G. 2. Morfe against Roach and others. In the chancery: Before the year 1718, the method was to deliver out a will of land to be proved at trials, or on commissions, upon security. Since that, the registers have refused to deliver out the will, but insist upon being paid for attending with it; and where it was wanted at a distance, their demands did run very high. In this cause an order was made (upon producing three precedents) that it should be delivered out on security; it being a bill brought by creditors and legatees, who were not likely to suppress it. *Str. 961.*

23. The seal of the ecclesiastical court (as to goods and chattels) doth authenticate the will, and is not to be contradicted; because, as there is no way in the temporal courts to prove the will relating to chattels, it must go on in the spiritual court, and the determination must there be final. For the temporal court cannot make a judgment concerning the will, contrary to what was made in the ecclesiastical court; and therefore if a probate is shewn under the seal of the ordinary, they cannot give in evidence that the will was forged, or that another person was executor; but they may give in evidence, that the seal was forged, or that there were bona notabilia, because it is not in contradiction to the real seal of the courts, but it admits the seal, and avoids it. And since the ecclesiastical court hath now the probate of wills settled by custom, the temporal court cannot prohibit them in their inquiries whether the testator was compos mentis or not, or whether the will be revoked or not, because that is necessary for authenticating the will. *Str. 671, 672.* Probate of a will of goods and chattels, how far evidence.

And by Holt chief justice; the judge of the spiritual court is the only proper judge to determine the validity of wills for things personal, and therefore the probate is undeniable evidence to a jury: and he said he remembered a case in the time of lord chief justice Kelyng, where an executor brought an action, and at the trial produced the probate, and the defendant's council offered to prove, that the supposed testator died intestate; but Kelyng chief justice told them, that the probate was evidence uncontrovertible; and with him concurred the other judges, and so it hath been always held since. *L. Raym. 262.*

But yet it is held, that if the probate of wills and granting administrations be traversed or denied in the king's courts, and issue joined, that the ordinary did not commit administration to such a one, or that the testament is not proved before the ordinary, or that he whose will is proved before the ordinary died intestate, or that he of whose goods administration is granted as of one intestate made a will; in these and the like cases it is held, that certificate shall not be made by the ordinary, but that it shall be tried by jury: and the reason given for it is, that probate of wills and granting administrations originally did not belong

long to the ecclesiastical cognizance, but were given to them of later times; and that therefore nothing but the probate and granting administration, which were given to them, doth appertain to their jurisdiction; but the *trial* thereof is not given to them, but is left to the trial of the common law. *Gibf.* 468. 9 *Co.* 40.

But before this time (in the 31 *El.*) in case of refusal or no refusal, how it should be tried; this distinction was laid down: where the issue is, whether the executor did refuse before such a day, or after, there the trial shall be by jury; contrary, where the issue is upon refusal generally, because the refusal is before the ordinary as a judge. And the case then before the court being this, "That the bishop certified that he did not refuse, whereas in truth he had refused before the commissary;" the court held, that they could not write to the commissary, since the bishop and not he was the officer unto the court to that purpose, and that the party could not aver against the certificate of the bishop any more than against the return of the sheriffs. *Gibf.* 468.

M. 8 *G.* The *King* against *Vincent* and others. Indictment for forging a will relating to a personal estate; and on the trial a forgery was proved: but the defendants producing a probate, that was held to be conclusive evidence in support of the will. *Str.* 481.

T. 12 *G.* The *King* and *Rhodes*. The defendant exhibited a will in doctor's commons as executor, and demanded probate. After a long contest there, it was determined in favour of the will; and upon appeal to the delegates, the sentence was confirmed. Afterwards, the parties who had been concerned in cooking up the will, fell out amongst themselves about the division of the estate; and thereupon it came out, that the will was forged; and upon full affidavits of the forgery, a commission of review (which it was agreed was the only method to bring the matter over again) was granted by the lords justices: and an indictment was also found for the forgery, and stood ready for trial in the king's bench. Upon motion for a *habeas corpus ad testificandum*, Raymond chief justice declared, that he would not try the cause. For there being yet a sentence subsisting in favour of the will, and the validity of that being now put under a proper examination; he did not think it fitting to determine the property by an indictment, which would come on more properly after the sentence was reversed. *Str.* 703.

In the case of *St Leger* and *Adams*; Holt chief justice said, Without doubt the register's book in the spiritual court is good evidence to prove that there was a will, altho' it be lost. *L. Raym.* 731.

And in the case of *Shepherd* and *Shorthose*, *H.* 7 *G.* Where the probate is lost, an exemplification of it from the act of the spiritual court hath been allowed as evidence of the will being proved. *Str.* 412.

H. 8 *W.* *Hee* and *Nelthrope*. It was held by Holt chief justice, that the copy of the probate of a will is good evidence, where the will itself is of chattels, for there the probate is an original taken by authority, and of a publick nature; otherwise, where the will is of things in the realty, because in such case the ecclesiastical courts have no authority

to take probates, therefore such probate is but a copy, and a copy of it is no more than the copy of a copy. 3 Salk. 154.

For the copy of an original is evidence, wherever the original is evidence, if proved a true copy; but the copy of the probate of a will of lands is no evidence, because the probate in such case is not an original taken by authority, and therefore is only a copy of a copy. Comb.

337.

By the statute of the 4 An. c. 16. intituled, An act for the amendment of the law, and the better advancement of justice, *No advantage or exception shall be taken of or for the default of alledging the bringing into court letters testamentary; but the court shall give judgment according to the very right of the cause, without regarding any such imperfections omissions and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shewn for cause of demurrer.*

24. By the 31 Ed. 3. st. 1. c. 4. *Whereas the ministers of bishops and other ordinaries of holy church, take of the people grievous and outrageous fine, for the probate of testaments and for the making of acquittances thereof; the king hath charged the archbishop of Canterbury and the other bishops, that they cause the same to be amended; and if they do not, it is accorded, that the king shall cause to be inquired by his justices of such oppressions and extorsions, to hear them and determine them, as well at the king's suit, as at the suit of the party, as in old time hath been used.* Fee for probate.

By a constitution of archbishop Mepham; *For the insinuation of the testament of a poor person, the inventory of whose goods shall not exceed 100 s, nothing shall be demanded.*

And by a constitution of archbishop Stratford: *We ordain, that for the probation, or approbation, or insinuation of any testaments whatsoever, nothing at all shall be taken by the bishops or other ordinaries: but we permit 6d and no more to be taken by clerks writing such insinuations, for their labour. But if the inventory of the goods of any person deceased do exceed the sum of 30 s in the computation, and do not extend to 100 s; the bishops, or ordinaries, or persons deputed by them and auditing the accounts, or other ministers assisting them in the auditing of such accounts, shall not take for the account, and doing all things concerning the same, and letters of acquittance, or other letters whatsoever, above 12 d. And if the inventories contain the sum of 100 s or more, and less than 20 l; they shall not take above 3 s. But if they contain the sum of 20 l or more, and less than 60 l; they shall not take above 5 s. If they contain the sum of 60 l or upwards, and less than 100 l; they shall have 10 s and no more. If they contain the sum of 100 l or more, and less than 150 l; they shall not take above 20 s. And so for every 50 l further, they shall take, besides the said sum of 20 s, the sum of 10 s and no more. But we permit the clerks, for every letter of acquittance which they shall write in this behalf, to take 6d above the premisses for their labour. And if any person in any the cases aforesaid shall take above the sum before ordained, in money or other things; he shall pay double within a month to the fabrick of the cathedral church. And bishops neglecting to pay the same within the time limited, shall be prohibited ab ingressu ecclesie; and the other inferiors neglecting*

gleeting the same as aforesaid, shall be suspended ab officio et beneficio, until they shall pay the same.

Probation] That is, taking the proofs. *Lind. 181.*

Approbation] That is, the decree for the validity of the testament. *Lind. 181.*

Insinuation] That is, publication thereof amongst the acts of the judge. *Lind. 181.*

Do exceed the sum of 30s in the computation] Lindwood seems to resent this constitution, as arbitrary and unreasonable; and observes, that the officers of the court were left at liberty to demand what they would, when the inventory was under 30s. *Lind. 181.*

For their labour] But if it shall happen that witnesses are to be examined, and their depositions to be taken in writing; it seemeth that for this they shall be rewarded besides, according to the quantity of their labour. And the same is to be understood, if the testament be long in writing; and it be to be registred, that then the register shall receive a reasonable satisfaction. *Lind. 181.*

By the 21 H. 8. c. 5. it is enacted, that *Nothing shall be demanded received nor taken, by any bishop ordinary archdeacon chancellor commissary official or any other person or persons who shall have power to take or receive probation insinuation or approbation of testament or testaments, by himself or themselves, nor by his or their registers scribes praisers summoners apparaters or by any other of their ministers, for the probation insinuation and approbation of any testament or testaments, or for writing, sealing, praising, registering, fines, making of inventories, and giving of acquittances, or for any other cause concerning the same, where the goods of the testator or person so dying do not amount clearly over and above the value of 100s, except only to the scribe to have for writing of the probate 6 d, and for the commission of administration of the goods of any man dying intestate not being above the like value of 100s clear, 6 d; and that nevertheless the bishop ordinary or other person having power to take the probation or approbation of testaments refuse not to approve any such testament, being lawfully tendered or offered to them to be proved or approved, so that such testament be exhibited to him or them in writing, with wax thereunto affixed ready to be sealed, and that the same testament be lawfully proved before the same ordinary (before the sealing) to be true whole and the last testament of the same testator, in such form as hath been commonly accustomed in that behalf. §. 2.*

And when the goods of the testator do amount over and above the clear value of 100s, and do not exceed the sum of 40l; that then they shall not for the probation insinuation and approbation of any testament or testaments, or for the registering, sealing, writing, praising, making of inventories, giving of acquittances, fines, or any other thing concerning the same, take or cause to be taken of any person but only 3s 6d, and not above; whereof to be to the bishop or ordinary or other person having power to take the probation or approbation of such testament, for him and his ministers 2s 6d, and not above; and 12d residue of the said 3s 6d, to be to the scribe for registering the same. And where the goods of the testator, or person so dying, do amount above the clear value of 40l; that then they shall not take for the probation

insinuation and approbation of any testament or testaments, or for the registering, sealing, writing, praising, making of inventories, fines, giving of acquittances, or any thing concerning the same probate of a testament, but only 5 s. and not above; whereof to be to the said bishop ordinary or other person having power to take the probate of such testament, for him and his ministers 2 s 6 d. and not above; and 2 s 6 d residue of the said 5 s. to be to the scribe for registering the same; or else the same scribe to be at his liberty to refuse the 2 s 6 d. and to have for writing of every ten lines of the same testament, whereof every line to contain ten inches, one penny. *l. 3.*

And that every such bishop or ordinary, or other person having power to take probate of testaments as aforesaid, their registers scribes and ministers, shall approve insinuate seal and register from time to time the said testament, and deliver the same sealed with the seal of their office, to the executor or executors named in any such testaments, for the said sum or sums aforesaid, and in manner and form as is above rehearsed, with convenient speed, without any frustratory delay. *l. 3.*

And if any person shall require a copy of the said testament so proved, or of the said inventories so made; that then the said ordinary or other persons having authority to take probate of testaments or their ministers, shall from time to time with convenient speed, without any frustratory delay, deliver or cause to be delivered a true copy or copies of the same, to the said person so demanding the same; taking for the search, and for the making of the copy of either of the said testament or inventory, but only such fee as is before rehearsed for the registering of the said testament; or else the scribe or register to be at his election and liberty, to have for every ten lines thereof, being of the proportion before rehearsed, one penny. *l. 5.*

Provided, that where any person or persons having power to take probate of testaments, have used to take less sums of money than is above said, for the probate of testaments, or commissions of administrations, or other cause concerning the same; they shall take and receive the same as before this act they have used to take, and not above. *l. 6.*

And every bishop ordinary archdeacon chancellor commissary official and other person having authority to take probate of testaments, their registers scribes praisers summoners apparators and all other their ministers whatsoever they be, that shall do or attempt or cause to be done or attempted against this act in any thing, shall forfeit for every time so offending to the party grieved in that behalf so much money as any such person aforesaid shall take contrary to this present act; and over that shall forfeit 10 l. whereof one moiety shall be to the king, and the other moiety to the party grieved that shall sue for the same in any of the king's courts: but that every of them, which shall incur or fall into the danger of such penalty or forfeiture, shall be charged only for himself, and none of them to be chargeable to that penalty for other's offence. *l. 7.*

S. 2. Or for any other manner of cause concerning the same] And it maketh no difference, whether the probate be written upon the testament it self, or upon a transcript ingrossed; and in this latter case, if a greater fee be taken by the judge on account of ingrossing, this is within the prohibition of the statute, as was adjudged in the case of

Rouse and Real, where the fee taken did amount to 4s 10d; and it was said, that if the executor requireth any to ingross the testament, he may agree with him, whom he requireth to do it, as he can; but the judge ought not to exact any fee on that account due to him. 4 *Inst.* 336. *Gibf.* 485.

Upon the whole, Dr Gibson observes, that it is agreed on all hands, that the fees given by this act are become much too small, by the great alteration of the value of money, and the prices of things; and therefore now the rule is, the known and established custom of every place, being reasonable: which, as he hath been informed (he says), hath been adjudged a good rule. *Gibf.* 487.

By *Can.* 132. it is ordained, that no judge or register, shall in any wise receive for the writing drawing or sealing of any such commission (as in the said canon before is mentioned) above the sum of 6s 8d, whereof one moiety to be for the judge, and the other for the register of the court.

And by the statute of the 26 H. 8. c. 15. *Forasmuch as divers of the king's subjects inhabited within the archdeaconry of Richmond in the county of York, have been of long time fore and grievously exacted and impoverished by the parsons vicars and others such as have benefices and spiritual promotions within the same, as by taking of every person when he dieth, in the name of a pension or of a portion, sometime the ninth part of all his goods and sometime the third part, to their open impoverishment; it is enacted, that no manner of spiritual person or others who shall have any manner of benefice or other spiritual promotion within the said archdeaconry, shall in no wise extort demand or take after the decease of any person, any such portions or pensions, nor any other demand or duty in the name or lieu of the same, on pain of a præmunire; but that all the king's subjects of the said archdeaconry, and their executors and administrators shall be ordered intreated and used for their goods and chattels after their decease, in like manner as is contained in the statute of the 21 H. 8. c. 5. for probate of testaments, and none otherwise: any use, custom, bull, composition, prescription, or ordinance heretofore obtained or used to the contrary notwithstanding.*

And by the 31 G. 2. c. 10. No ecclesiastical court, or any person whatsoever, under any pretence, shall take more than 1s, for the seal, parchment, writing and suing forth of the probate of any will, or any letters of administration, granted to the widow or children, father or mother, brother or sister, of any inferior officer, seaman, or marine, dying in the pay of his majesty's navy, and for the pains trouble and expence attending the suing forth of such probate or letters of administration, unless the goods do amount to the value of 20l; nor more than 2s, unless the goods do amount to the value of 40l; nor more than 3s, unless the goods do amount to the value of 60l: And in all cases where it shall be necessary to issue commissions, to swear the widows or children, father or mother, brother or sister, being executors or administrators of such inferior officers, seamen, or marines; no ecclesiastical court, or any person whatsoever, under any pretence, shall take more than 1s, for the seal, parchment, writing and suing forth of any such commission, and for the pains trouble and expence attending the same, unless the goods do amount to 20l;

20l; nor more than 2 s, unless the goods do amount to 40 l; nor more than 3 s, unless the goods do amount to 60 l: On pain of forfeiting 50 l to the party grieved; to be recovered, with full costs, by action of debt bill plaint or information, in any of his majesty's courts of record at Westminster, or elsewhere. f. 23.

25. By the several stamp acts; for every skin or piece of vellum or Stamps parchment or sheet or piece of paper on which shall be written any probate of a will, for any estate above the value of 20l, shall be paid a stamp duty of 10s: except of common seamen or common soldiers slain or dead in the service.

Inventory, or any copy thereof, one shilling.

Copy of a will, two pence.

26. If the executor die intestate, the testator also from that time shall be deemed intestate, and administration may be committed in this case of the goods not administered. *Swin. 382. 1 Roll's Abr. 907.*

But if the executor maketh an executor, and dieth; his executor shall be executor to the first testator, in case there be no executor. *Swin. 329.*

And if the executor of an executor assume the administration of the first testator's goods, he cannot afterwards refuse the administration of the goods of the latter testator; but he may accept the latter, yet refuse the former. *T. 17 J. Wolfe and Heyden. Hutt. 30.*

But an executor's executor shall not be admitted to administer the goods of the first testator, where the first executor refused to administer, or died before probate; unless the residuum bonorum, after the debts paid, be given by the will to the first executor. *Dyer 372.*

E. 4 & 5 P. & M. Two executors, one of them proved the will, the other refused before the ordinary, who thereupon granted administration to the other, who made his executor, and died; and that executor alone brought an action of debt, for a debt due to the first testator: and adjudged, that the action did lie; for tho' he who refused might administer at any time, yet it must be in the life time of his companion; and he being dead, that election is gone. But where an administrator got judgment, and then died intestate; his administrator cannot have execution on that judgment, because he is not privy to it. *Dyer 160.*

II. Of the administration of intestates effects.

THIS matter concerning the administration of intestates effects, so far as the same hath respect unto peculiar jurisdictions, bona notabilia, process in the king's name, the oath in animam constituentis, administration by commission, and the fees of administration of seamen's effects, hath been treated of already in the law concerning the probate of wills.

1. As to the disposition of intestates effects, and granting administration, it is plain, that by the common law, and before the statute of the

Power of the ordinary.

13 Ed.

13 Ed. 1. st. 1. c. 19. here following, the ordinary had the absolute disposal of intestates effects. 2 Bac. Abr. 398.

But lord Coke thinks, that this was granted to him by some particular constitutions; and therefore says, that anciently the kings of England, by their proper officers were wont to take the goods of intestates into their hands. 9 Co. 36.

And there are several instances, in Madox's history of the exchequer, where the king issued a mandate to his officers, to attach the goods of divers persons who died intestate. Mad. Exch. 237.

But this seemeth to have been only in case where they were indebted to the king; who by the law was to be satisfied before the other creditors; according to the statute of magna charta, c. 18. which enacteth as follows: *If any that holdeth of us lay fee do die, and our sheriff or bailiff do shew our letters patents of our summons for debt, which the dead man did owe to us; it shall be lawful to our sheriff or bailiff to attach and inroll all the goods and chattels of the dead, being found in the said fee, to the value of the same debt, by the sight and testimony of lawful men, so that nothing thereof shall be taken away, until we be clearly paid of the debt.*

But so much as remained over and above the king's debt, or if nothing was owing to the king, then the whole, was in the sole power of the ordinary to dispose. And therefore if a man died intestate, neither his wife, child, or next of kin, had any right to a share of his estate, but the ordinary was to distribute it according to his conscience to pious uses; and sometimes the wife and children might be amongst the number of those whom he appointed to receive it; but however, the law trusted him with the sole disposition. 2 Bac. Abr. 398.

The first statute that abridged the power of the ordinary herein, was the aforementioned statute of the 13 Ed. 1. st. 1. c. 19. by which it is enacted as followeth: *Whereas after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the ordinary to be disposed; the ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament.*

Dying intestate] There be divers kinds of intestates; one, that maketh no will at all; another, that maketh a will and executors, and they refuse, in this case he dieth *quasi intestatus*, and these are within the purview of this act. Therefore the ordinary is the person whom the law appointeth to have the charge or administration of the goods and chattels of the party that dieth intestate, or *quasi intestatus*. And justly did the law in this case appoint the ordinary; for the law presumed, that he who had the care of his soul in his life time, would after his death have care of his temporal goods and chattels, to see them well disposed and administered. 2 Inst. 397.

Which is bounden to some other for debt] This is not only intended of an obligation or deed in writing, but howsoever he was charged in law, as for rent upon a lease, or upon an assumpsit, or the like. 2 Inst. 397.

For debt] This act is not only intended of that which is properly a debt, but of all duties, covenants, or just causes of action, such as might be brought against executors. 2 *Inst.* 397.

The goods come to the ordinary to be disposed] So that this statute doth not give this power of disposing, but supposeth it in the ordinary; the statute being as to this, in affirmance only of the common law. 5 *Co.* 83.

But unless some of the goods or chattels came to the hands and possession of the ordinary, he was not to be charged by the common law; but if they came to his hands, and he should neither administer and pay the debts and duties himself, nor commit them over to the kin and friends of the intestate that would, the common law did charge him, and so doth this act which is made in affirmance of it. 2 *Inst.* 397.

Goods come to the ordinary] If a man die intestate, and a stranger taketh the goods; the ordinary shall not have an action of trespass for taking of them (unless he had taken them into his possession). But the executor or administrator before seizure may have an action of trespass. 2 *Inst.* 397.

Come to the ordinary] Neither can the ordinary have any action of debt, covenant, or any other action which belonged to the intestate; but these to whom the ordinary committeth administration may have all these actions by the statute of the 31 *Ed.* 3. (hereafter following); but before that statute, there was no remedy by law given to the administrators, to recover those things in action. 2 *Inst.* 397, 398.

But by the common law, an action of debt did lie against the administrators, but it was by the name of executors until the said statute of the 31 *Ed.* 3. 2 *Inst.* 398.

To the ordinary] If the ordinary take goods of the intestate, being out of his diocese, he shall not be charged as ordinary by this act; because he taketh them of his own wrong, and not as ordinary, in which right he is to be charged by this act. 2 *Inst.* 398.

Ordinary] That is, not only the bishop, but every one that is in stead of the bishop, in this matter of taking care and cognizance of the goods of intestates; as archdeacon, chancellor, commissary, official, and those who have peculiar jurisdiction. Some of whom having, from time to time, accidentally omitted their title or stile of jurisdiction in the letters of administration by them granted, have occasioned various contests in the courts of common law, concerning the validity of administrations executed in virtue of such letters; as the judgments upon the validity or invalidity of them have been also various. The enumeration of which is not material; since there is one safe short and plain rule (viz. the inserting in all such letters the stile of jurisdiction, as well as the name of the ordinary) which being observed, is a security for ever against all such contests. *Gibb.* 478.

And not only an ordinary or guardian of the spiritualities or others that be in the place of the ordinary of right, are within this act; but also such as usurp the place, and are in possession by wrong, are to be charged by this act. 2 *Inst.* 398.

To be disposed] If it be demanded what interest the ordinary hath in the goods of the person intestate, which come to his hands; it is answered, that he hath such an interest, as the administrator to whom administration is committed during the minority of an executor, to the behoof and profit of the executor, and not otherwise, nor in other manner. So as the ordinary may administer for the good of the intestate, but cannot give the goods of the intestate, or do any thing to his prejudice. 2 *Inst.* 398.

The ordinary from henceforth shall be bound] If goods of the intestate come to the hands of the ordinary, and he dieth, altho' the words be that *the ordinary shall be bound*, yet his executors or administrators shall be charged in an action of debt; for when this act bindeth the ordinary, by consequent his executors or administrators are bound. But if the ordinary commit administration to one, and he taketh the goods into his possession and dieth, no action lieth against his executors. 2 *Inst.* 398.

If the ordinary take goods into his hands of the intestate, and after commit administration, and the ordinary retaineth the goods; he shall be charged, notwithstanding the committing of administration. 2 *Inst.* 398.

Shall be bound to answer] At the common law, the ordinary might have had trespass for goods taken out of his possession; but no action did lie against the ordinary: but now by this statute, an action lieth against him; but he cannot have action by this statute. 1 *Roll's Abr.* 906.

Ordinary
may be com-
pelled.

2. If administration is denied by the ordinary, to the person who is intitled to it; a mandamus will go from the temporal courts to grant it: except a controversy is depending, whether there is a will or not; for then (as Holt chief justice said) suppose the will should prove good, what will the granting of administration signify? *Gibbs.* 478.

H. 3 G. 2. K. and Bettefworth. In the case of a will, a mandamus was granted to Dr Bettefworth, as judge of the prerogative court of Canterbury, to grant probate of the earl of Londonderry's will, to the executors therein named. The doctor returned, that it is the custom and practice of the prerogative court, that if any creditor of the deceased enters a caveat against granting probate, and swears himself to be a creditor, there goes out a commission of appraisement, till the return whereof the judge hath not used nor ought to grant any probate: then he sets out, that two creditors, who swore to their debts, entered a caveat, and prayed a commission of appraisement; which was decreed and issued, but is not yet returnable; and for that cause he cannot as yet grant a probate. Upon argument, the court held the return to be ill; for that the judge can only stay the probate, where there is a contest about the validity of the will. This commission of appraisement can be of no use but to spend money, and delay the executor from getting in the effects of the testator. And by the 21 *H. 8. c. 5.* the probate is to be granted *with convenient speed, without any frustratory delay*; and the ecclesiastical court shall never be suffered to set up their practice against the law of the land. And a peremptory mandamus was granted. *Str.* 857.

H. 4 G. 2. Smith's case. It was moved for a mandamus to Dr Bettefworth, commanding him to grant administration to Smith of the goods of his deceased son, during the minority of his grandson. Against this it was insisted, that the father hath not an equal right with the son; and that the spiritual court hath always considered these administrators only as trustees for the infant, and have never kept to any rule in granting them, but according to the circumstances of the family: where there are several in equal degree, as children, they have always chosen which they pleased. And by the court; when we grant a mandamus, it is to oblige the judge to do right to the party who sues the writ; but as there is no law which says, to whom these administrations during minority shall be granted, there is no law to be put in execution. In the case of the next of kin, he is intitled de jure, and therefore in his case we grant a mandamus of course. We will grant no mandamus in this case. *Str.* 892.

M. 7 G. 2. K. and Bettefworth. John Kynaston, esquire, made his will, and two persons executors, and left the residue of his personal estate to his youngest son Edward. The executors renounced; and the residuary legatee moved for a mandamus to be admitted to prove the will, and have administration with the will annexed. And a rule was made to shew cause. On shewing cause, it was insisted, that this case differed from lord Londonderry's, where the commission of appraisement was set up against the immediate grant of the probate, which the statute of the 21 *H. 8. c. 5.* requires shall be without any frustratory delay; and the ordinary hath no election there: whereas in the present case, he is not bound to grant the administration to the residuary legatee, none of the statutes mentioning him; on the contrary, the statute of the 21 *H. 8. c. 5.* which takes notice of the renunciation of executors, leaves the matter to the election of the ordinary. And of this opinion was the court; who said, if the commission of appraisement was a grievance, it would be proper matter of appeal, but they could not break into the practice of the court below. And lord Hardwicke mentioned a case in chancery before lord Macclesfield, between Wheeler and the archbishop of Canterbury, where it was held, that these sort of administrations are not within the statute of distribution; which brings it to Smith's case, where a mandamus to grant administration during the minority of an executor, to the father of the executor, was refused; because there was no law obliging the spiritual court so to do. And the rule for a mandamus was discharged. *Str.* 956.

H. 4 G. 2. K. and Bettefworth. Mandamus, to grant administration to John Cullom, of Joan his wife. Return; that by articles before marriage it was agreed, that the wife should have power to make a will, and dispose of her leasehold estate; that pursuant to this power, she made a will, and her mother executrix, who hath duly proved the same. To this return it was objected, that she might have things in action not covered by the deed, and the husband was in all events intitled to an administration as to them. Which was agreed to by the court; and a peremptory mandamus was granted. *Str.* 891.

T. 12 G. 2. K. and Bettefworth. Mandamus to grant administration to Mr Bridgen, husband of the late lady Bellamont deceased. The dean of the arches returned, that a suit had been commenced before him, between Mr Bridgen and a son of the deceased, who claimed to be her executor under a will made by her pursuant to a deed executed before marriage; whereby the husband agreed she should have power to make a will and dispose of her estate; which deed Mr Bridgen had confessed, and thereupon sentence had been given for the validity of the disposition, but not for any executorship created thereby: and thereupon a new suit was instituted by the daughter against the son and Mr Bridgen, for administration with the will annexed; which is still depending. And upon consideration the court declared, that no peremptory mandamus ought to go: for tho' generally the husband is intitled to the administration as next of kin; yet that is in respect of the interest he has in the estate, and because no body is in equal degree: and that is the reason, why administrations are so often granted to a residuary legatee: and tho' strictly speaking this is no will, but rather an appointment which is to operate in equity; yet the true question is, whether this is such an intestacy, as is within the meaning of the statute. And the law, particularly the 29 C. 2. c. 3. considers *femes covert* as having some right to dispose of their effects, which can only be by the agreement of the husband, which appears in this case; and this differs greatly from the case of Cullom, where the power was only as to a leasehold estate, whereas she might have other effects. The matter is properly under the consideration of the spiritual court to whom to grant the administration, and there is no reason for us to interpose; and therefore the return must be allowed. *Str. 1112.*

Refusal of administration.

3. The person to whom administration is granted, may refuse to take it upon him if he will; for the ordinary hath not power to compel him to accept it. *Swin. 384.*

To be granted to the widow or next of kin.

4. By the statute of the 31 Ed. 3. st. 1. c. 11. *In case where a man dieth intestate, the ordinary shall depute the next and most lawful friends of the deceased, to administer his goods.*

The ordinary shall depute] Before this statute, the ordinary was not compellable to grant administration; but now by this act he is commanded, and thereby compellable to grant administration; and a refusal to do it, is a contempt to the king, and an injury to the party. 9 Co. 40.

To the next and most lawful friends] Before this act, the ordinaries might have granted administration to whom they pleased; but hereby they are restrained, to the next and most lawful friends. 9 Co. 40.

Most lawful friends] That is, to the next of blood, who are not attainted of treason, felony, or have other lawful disability. 9 Co. 40.

As, by the 9 & 10 W. c. 32. Persons denying the trinity, or asserting that there are more gods than one, or denying the christian religion to be true, or the holy scriptures to be of divine authority, shall for the second offence be disabled to be administrators.

And

And by the several acts for qualifying for offices, persons executing their offices not being qualified, after the time limited for their qualification shall be expired, shall be disabled to be administrators.

If a *bastard* dies intestate, without wife or issue, leaving a personal estate; in such case, the king shall be intitled, and the ordinary shall grant administration to the king's patentee. 3 *Peere Will.* 33.

And by the statute of the 21 H. 8. c. 5. *In case any person die intestate, or the executors named in any testament refuse to prove the said testament; then the ordinary or other person having authority to take probate of testaments, shall grant the administration of the goods of the testator, or person deceased, to the widow of the same person deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good. And in case where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator or person deceased; and where any person only desireth the administration as next of kin, where indeed divers persons be in equality of kindred; in every such case, the ordinary to be at his election and liberty, to accept any one or more making request, where divers do require the administration: or where but one, or more of them, and not all being in equality of degree, do make request; then the ordinary to admit the widow, and him or them only making request, or any one of them, at his pleasure.* f. 3, 4.

To the widow of the same person deceased, or to the next of his kin] T. 9 G. It was moved for a mandamus to the official of the bishop of Gloucester, to commit administration to the widow of an intestate. But by the court; That will be to deprive the ordinary of his election, in granting it to her, or the next of kin; therefore take your mandamus generally, to grant administration of the goods of the intestate. *Str.* 552.

Or both] And this, either jointly or separately: for the ordinary may grant several administrations of several parts of the goods of the intestate. 1 *Roll's Abr.* 908.

Thus in the case of *Fawtry and Fawtry, H. 3 W.* A man died intestate, leaving a wife and a brother. The ordinary had granted the administration of some particular debts to the brother, and of the residue to the wife. And a mandamus was moved for to grant administration to the wife. But by the court; the ordinary may grant administration to the brother as to part, and to the wife for the rest; in which case neither can complain; since the ordinary need not have granted any part of the administration to the party complaining. But if the intestate leave a bond of 100 l, the ordinary cannot grant administration of 50 l to one person, and 50 l to another, because this is an intire thing. 1 *Salk.* 36.

5. If a feme covert die intestate; administration of her goods of right appertaineth to her husband, as her next and most lawful friend within the statute. 1 *Roll's Abr.* 910. To the husband, of the wife's effects.

And this is confirmed by the statute of the 29 C. 2. c. 3. which enacteth, that the statute of the 22 & 23 C. 2. c. 10. concerning the distribution of intestates effects, shall not extend to the estates of *femes covert* that shall die intestate, but that their husbands may demand and have administration of their rights credits and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act. 29 C. 2. c. 3. f. 5.

And if the husband die before administration taken by him; his executors or administrators, and not the wife's next of kin, shall be intitled. 1 P. Will. 381.

But if the wife was executrix to another; then, as to the goods which she had in that capacity, administration must be granted to the next of kin to the testator. 3 Salk. 21.

To the father
or mother,
of their chil-
dren's effects.
To the
grandmother
before uncles
and aunts.
To the son
before the fa-
ther.
Half blood.

6. Administration may be granted of the goods of the son or daughter, to the father or mother as next of blood. *Law of Test.* 466.

7. If one dies intestate, leaving a grandmother and uncles and aunts; the grandmother is intitled to the administration, in exclusion of the uncles and aunts. *Pre. Cha.* 527.

8. If there be grandfather, father, and son; and the father dies intestate: the son shall have the administration, and not the grandfather. 2 Vern. 125.

9. Administration must be granted to the brother of the half blood before the uncle; for he has the immediate blood of the father, which the uncle hath not. 1 Ventr. 425.

And the half blood in this respect is esteemed as near as the whole. But if there is a brother, and a sister of the half blood, and the sister is married; then it must be granted to the brother, and not to her and her husband; because in effect it makes the husband administrator, who is not of kin to the intestate: and if she die, the husband would still continue administrator, and so might possess himself of the whole personal estate. 3 Salk. 21.

In general,
to the next of
kindred.

Residuary le-
gatee, or
principal cre-
ditor.

10. Generally, by the statute aforesaid, administration shall be granted to the wife or next of kindred: and who these next of kindred are, will fall in more properly under the head concerning distribution.

11. There is one exception to the rule about the next of kin, in case where the executor refuseth, or accepting dies intestate; and that is, with respect to the residuary legatee: who being intitled to what remains after debts and legacies paid, hath the first and best title to be administrator of the estate; as was agreed in the case of *Thomas and Butler*, T. 24 C. 2. For this taketh away the presumption of the statute, that the testator would have given it to the next of kin. *Gibbs.* 479. 1 Ventr. 217.

And by King lord chancellor, M. 1725. Notwithstanding the statute of Hen. 8. administrations have been granted to the principal creditor from the next of kin, by the opinion of both civil and common lawyers; where it is visible, that the next of kin cannot have any advantage or benefit of the estate. And this hath been always taken to be out of the statute. *Viner.* Executors. K. 24.

But

But this, as it seemeth, should be understood only in case where the kindred refuse to accept the administration. And the practice is usually for the ordinary first to issue a citation for the next of kin in special, and all others in general, to accept or refuse letters of administration, or shew cause why the same should not be granted to a creditor. And in case there are several creditors; the court generally obliges them to enter into articles and bond of average. And such creditor must make an affidavit of his debt, and therein set forth how much it is, and how due.

12. There are also other administrations, which are not within the statutes aforesaid: As, administration during absence out of the kingdom. Concerning which, in the case of *Clare and Hedges*, *E. 3 W.* it was held clearly by the court, that such administration is grantable by law, and that it may be a great conveniency so to do; for if the next of kin be beyond sea, and such administration could not be granted, the debts due to the intestate might be lost. 1 *Lutw.* 342.

Administration during absence out of the kingdom.

And in the case of *Slater and May*, *M. 3 An.* Holt chief justice said, that it was reasonable there should be such an administrator, and that this kind of administration stood upon the same reason as an administration during the minority of an executor, namely, that there should be one to manage the estate of the testator, till the person appointed by him is able. 2 *L. Raym.* 1071.

13. Also, administration pending a suit; or, if there be no controversy, then until the executor comes in; which, as well as the last before mentioned, do fall of course, as soon as the consideration ceaseth upon which they were first granted. *Gibf.* 574. 2 *Bac. Abr.* 415. 2 *P. Will.* 576.

Pendente lite.

14. An infant, how young soever he be, may be executor; yet the execution of the will shall not be committed unto him, until he attain the age of seventeen years; for administration granted durante minority ceaseth, when the infant executor attains to that age of seventeen years. *Swin.* 331.

During the minority of an infant executor or administrator.

And Dr Swinburne says, If it be a female infant, and married to a man of seventeen years of age or more, it is then as if her self were of that age, and her husband shall have the execution of the will and administration thereof. *Swin.* 331.

And in *Prince's* case, *5 Co.* 29. it is said to have been adjudged, that if administration is granted during the minority of a woman, and she takes a husband of age; the administration ceaseth: for that she hath a husband who may administer as executor.

But in the case of *Jones* and the earl of *Strafford*, *M. 1730.* It was determined, that where administration is granted during the minority of an infant executrix under seventeen, and she marries an husband of full age; this doth not determine the administration. By King lord chancellor, and Raymond chief justice. 3 *P. Will.* 88.

But altho' an administration during the minority of an infant executor ceaseth at his age of seventeen years; yet an administration during the minority

minority of an infant *administrator* ceaseth not until his age of twenty one. As in the case of *Freke and Thomas*, E. 13 W. Debt upon bond brought by an administrator during the minority of an administrator. Upon demurrer to the declaration, exception for the defendant was taken, that it appeared upon the declaration, that he, during the minority of whom administration was granted to the plaintiff, was above the age of seventeen, and so the administration determined; that this case doth not differ in reason, from the case of an administrator during the minority of an executor, which determines at the age of seventeen; nor from the case where a woman executrix under the age of seventeen marries a husband above the age of seventeen: for the only thing that the law considers, is the ability of the person to administer the estate of the dead, who ought to have the administration of it, which ought to be the same in both cases; and in *Vaugh.* 98. the rule of averment of the age of an administrator or executor to be under seventeen, is equally put of both; and the statute of distribution will make no difference, because an infant may find sureties, tho' he cannot be bound himself. But not allowed: For by Holt chief justice, there is a difference between administration during the minority of an executor, and of another person; for an administrator during the minority of a residuary legatee, ought to be understood to be during his legal minority. For the authority that the administrator hath, is given to him by the statute; and an infant hath not been adjudged a legal person, to be intrusted with the management of an estate. But an executor, who comes in by the act of the party himself, hath been adjudged capable to administer at seventeen. But the law in the exposition of a statute will not make such construction. And care is taken of the administration, by the commission of administration during his minority to his next friend. And this is the opinion of the civilians, and it hath been held accordingly by the commissioners delegate. And therefore judgment was given for the plaintiff. *L. Raym.* 667.

And this is by construction of the statute of distribution, which requireth that the administrators shall enter into bond. 1 *Salk.* 39. And the like was determined, in the case of *Atkinson and Cornish*, E. 10 W. *L. Raym.* 338. And afterwards, in the case of *Edmund and Shaler*, T. 7 An. wherein this distinction was taken, that the age of seventeen years allowed to be the age when an executor may take the executorship upon himself, is in conformity to the *spiritual* law, which allows an infant of seventeen years to be proctor or agent for another; but *administration* is granted by the authority of the statute of the 31 *Ed.* 3. and therefore the person who has administration granted to him ought to be capable by the *common* law, by which the legal age is twenty one, and consequently administration granted to another during his minority, does not determine till his age of twenty one years. *Comyns.* 159.

If an action be brought by an administrator during the minority of an executor, he must aver, that the executor is within the age of seventeen years, otherwise it is an error; but if an action be brought against such an

an administrator, there need no such averment, because the plaintiff is a stranger to the defendant's power. *H. 13 J. Carver and Haslerigg. Hob.*

251.

There were two executors, and one of them was an infant; and whether he must be joined in the action with the other as plaintiff, was the question: It was objected that he must not, because an infant cannot make a warrant of attorney; and if he could, he cannot instruct him. Adjudged, they may both sue by their attorney, because they both represent the person of the testator, and sue in the right of another, and therefore the infant must be joined with the other. *Foxwith and Tremain. H. 21 & 22 C. 2. 1 Mod. 47. 1 Sid. 449. 1 Ventr. 102.*

Where administration is granted during the minority of divers executors; he that comes first of age shall prove the will, and the administration ceaseth. *Law of Test. 473, 474.*

So if one maketh two executors, one of the age of seventeen, and the other under; administration during the minority of him that is under age is void: because he that is of the age of seventeen may execute the will. *1 Brownl. 46.*

And it is said, that the ordinary may grant administration during the minority of an infant to whom he pleases: for the next of kin, in respect to administrations, only concerneth the infant, and not the person who is employed for the infant until he comes of age. *Fitz-Gib. 163.*

15. If a feme covert, as next of kin, hath a right to administer, the administration ought not to be granted to the husband and wife; for then if she should die before him, he would continue administrator, against the meaning of the act. *Brown and Wood. H. 23 Car. Aleyn 36. Style 74, 75.* Feme covert
administra-
trix.

But it was said, that if it had been granted to them only during the coverture, perhaps it might be good; because, if granted to the wife only, the husband might, during the coverture, have administered. *Aleyn. 36.*

If the wife as a residuary legatee, hath a right to take administration, but refuseth, and prays it may be granted to another, and not to her husband; yet it may be granted to her husband. *Vantbienen's case. Fitz-Gilb. 203.*

16. If an administrator die, his executors are not administrators, but it behoveth the ordinary to commit a new administration. *1 Roll's Abr. dying. 907.* Administrator

Where administration is granted to two, and one of them dies; the administration surviveth to him who is living. *Hudson and Hudson. T. 1735. Cas. Talb. 17.*

17. If none of the kindred will take administration, then it shall be granted to those who shall desire it: And if none will take the administration, the ordinary may grant letters *ad colligendum bona defuncti*, and thereby take the goods of the deceased into his own hands, wherewith he is to pay debts and legacies, so far as the goods will reach; for which himself Where none
will admini-
ster.

himself becomes liable in law, as other executors or administrators. *Swin. a. 448.*

May be
granted out
of the jurif-
diction.

18. Letters of administration are not of necessity to be granted within the limits of the jurisdiction; the granting thereof being not a judicial, but a ministerial (and therefore not a local) act; wherein the bishop acts, as a person designed and appointed by the law. *Gibf. 478.*

Cannot act
before ad-
ministration.

19. But an administrator cannot act before letters of administration granted to him. *1 Salk. 301.*

But he may bring a bill in chancery; though this would be an exception in an action at law. *Barnardist. 320.*

Time of
granting ad-
ministration.

20. The practice is, not to issue letters of administration, until after the expiration of fourteen days from the death of the intestate; unless for special cause (as that the goods would otherwise perish, or the like) the judge shall think fit to decree them sooner. *1 Ought. 323, 324.*

Administra-
tor's oath.

21. The oath to be made by the administrator, on his taking out letters of administration, is usually in this form: "You shall swear, that you believe A. B. deceased died without a will; and that you will well and truly administer all and every the goods of the said deceased, and pay his debts so far as his goods will extend; and that you will exhibit a true, full, and perfect inventory of the said goods of the deceased, and render a true account of your administration into the — court of C. when you shall be thereunto lawfully required: So help you God." *1 Ought. 323, 324.*

Bond on
granting ad-
ministration.

22. By the statute of the 21 H. 8. c. 5. *In case any person die intestate, or the executors named in any testament refuse to prove the said testament; then the ordinary or other person having authority to take probate of testaments, shall grant the administration of the goods of the testator or person deceased; taking surety of him or them to whom shall be made such commission, for the true administration of the goods chattels and debts, which he or they shall be so authorized to minister. s. 3.*

And by the statute of the 22 & 23 C. 2. c. 10. *All ordinaries, as well the judges of the prerogative courts of Canterbury and York, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their granting and committing of administrations of the goods of persons dying intestate, of the person or persons to whom any administration is to be committed take sufficient bond with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, mutatis mutandis, viz.*

"The condition of this obligation is such, that if the within bounden A B, administrator of all and singular the goods chattels and credits of C D deceased, do make or cause to be made a true and perfect inventory of all and singular the goods chattels and credits of the said deceased, which have or shall come to the hands possession or knowledge of him the said A B, or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of — court, at or before the — day

“ day of — next ensuing; and the same goods chattels and credits
 “ and all other the goods chattels and credits of the said deceased at the
 “ time of his death, which at any time after shall come to the hands or
 “ possession of the said *A B*, or into the hands and possession of any
 “ other person or persons for him, do well and truly administer accord-
 “ ing to law; and further do make or cause to be made a true and just ac-
 “ count of his said administration, at or before the — day of —;
 “ and all the rest and residue of the said goods chattels and credits which
 “ shall be found remaining upon the said administrator’s account, the
 “ same being first examined and allowed of by the judges for the time
 “ being of the said court, shall deliver and pay unto such person or per-
 “ sons respectively, as the said judge or judges, by his or their decree
 “ or sentence pursuant to the true intent and meaning of this act, shall
 “ limit and appoint; and if it shall hereafter appear, that any last will
 “ and testament was made by the said deceased, and the executor or
 “ executors therein named do exhibit the same into the said court, ma-
 “ king request to have it allowed and approved accordingly, if the said
 “ *A B* within bounden being thereunto required do render and deliver
 “ the said letters of administration (approbation of such testament being
 “ first had and made) in the said court; Then this obligation to be void
 “ and of none effect, or else to remain in full force and virtue.”

Which bonds shall be good to all intents and purposes, and pleadable in any courts of justice. f. 1, 2, 3.

The condition of the bond, as to administering truly according to law, is to be intended in bringing in his account, and not in paying the debts of the intestate; and therefore a creditor shall not take an assignment of the bond, and sue it, and for breach assign non-payment of a debt to him, or a devastavit committed by the administrator; for that would be endless and infinite. 1 *Salk.* 316.

T. 13 G. 2. Folkes and Docminique. The plaintiff declares on bond in the *detinet*, against the defendant as administrator during minority with the will annexed. And upon oyer, the condition appears to be, for exhibiting an inventory and duly administering by paying debts and legacies. The performance of all which the defendant avers. The plaintiff replies, that he had not paid a legacy of 1500 l, tho’ he had more than sufficient to pay all the debts, to wit, 500 l. And on demurrer it was objected, that this was a void bond, not warranted by the statute of the 21 *H. 8. c. 5.* (nor by the statute of the 22 & 23 *C. 2. c. 10.* for neither of those statutes extendeth to administrators during the minority of an executor) not yet by the common law; for that it requireth the administrator to pay legacies according to the ecclesiastical decision, and shall be taken to be obtained by coercion. On the contrary, it was argued, that this not being on an intestacy (nor in case where an executor refuseth) is not within the statutes it is true; but it is to be supported as a reasonable bond taken by the course of the ecclesiastical court. And tho’ formerly it was disputed, yet it is now settled, that they may compel distribution: that here the breach is assigned in non-

payment of legacies, of which they have undoubted jurisdiction: and if it be good in any part (being a bond at common law) it is enough. And it differs from the case, where part of the condition is against a statute, for there it is void in toto. And by the court; These administrations are not within the statutes, and therefore we deny a mandamus: we must therefore consider it as a bond at common law; and then it is sufficient if it be good in that part on which the breach is assigned; as we think this is, and we cannot take it to be a bond by coercion. Therefore the plaintiff must have judgment. *Str.* 1137.

Fee for administration.

23. By the statute of the 21 H. 8. c. 5. *The ordinary shall take nothing for letters of administration, unless the goods of the person deceased amount above the value or sum of 100 s; and in case the goods of the person deceased amount above the value of 100 s, and not above the value or sum of 40 l, he shall take only for the same 2 s 6 d and not above.* f. 4.

Here is no provision where the goods exceed the value of 40 l; which seemeth to have been an omission not intended. And in 2 *Roll.* 233. *Palm.* 318. a person was indicted because he took 10 s for letters of administration, against the form of the statute; but because the statute makes no provision in case the goods are above 40 l (which was casus omisus), and the indictment did not set forth that they were under 40 l, and by consequence that the taking more than 2 s 6 d was extortion within the statute, therefore it was adjudged to be ill, inasmuch as without that it could not appear to the court, whether he was punishable or not. *Gibb.* 485.

Other matters relating to the said fees, are specified in the former part of this chapter, in treating of the fees for probate of wills; and the whole, more especially, under the title *Fees*.

Stamps.

24. By the several stamp acts, For every skin or piece of vellum or parchment, or sheet or piece of paper, on which shall be written any letters of administration (except of common seamen or common soldiers slain or dead in the service) for any estate above the value of 20 l, shall be paid a stamp duty of 10 s; and for every inventory or copy thereof 1 s.

Letters of administration allowed as evidence.

25. The plaintiff could not produce any letters of administration, yet to prove himself administrator, he produced the book of the spiritual court, wherein there was an order entred, that administration shall be granted to him; and this was allowed to be good evidence. 1 *Lev.* 101. *Peasley's case*.

And by the 4 *An. c.* 16. No advantage or exception shall be taken, for the default of alledging the bringing into court any letters of administration; but the court shall give judgment according to the very right of the cause, without regarding such omissions and defects, except the same shall be specially and particularly set down and shewn for cause of demurrer.

Revoking administration.

26. The ordinary cannot repeal an administration at his pleasure. *Swin. a.* 381.

H. 15 & 16 C. 2. Sands's case. Sir George Sands administered to his son, and afterwards a woman pretending to be his wife, sued for a repeal,

peal, but a prohibition was granted; because the ordinary had an election to grant it either to the father or wife, and had executed his power by granting it to the father. *Raym.* 93.

But where a feme covert died intestate, and the next of kin to her obtained administration, and the husband sued for a repeal, a prohibition was denied; because in this case the ordinary had no power or election, to grant it to any person but to the husband. 3 *Salk.* 22.

And the rule seemeth to be, that an administration may be repealed, altho' not arbitrarily, yet where there shall be just cause for so doing; of which the temporal courts are to judge; as, if the administrator should become lunatick, or the like. So if the next of kin, at the time of the death of the intestate happen to be incapable of administering, by reason of attain, or excommunication; and the ordinary commits it to another: if he afterwards becomes capable, the ordinary may repeal the first administration, and commit it to the next of kin. *Giff.* 479.

And the same thing is much more to be said, where the administration was undue ab initio, whether as granted to other than the next of kin, or granted by an incompetent authority, or in an irregular manner without citing those who ought to have been cited. *Giff.* 479. 2 *Bac. Abr.* 410.

T. 5 G. 2. *Harrison and Weldon.* Walker Weldon died intestate, leaving Anne his wife, and Amphillis his sister. The sister upon the common oath, that she believed he died intestate without wife or children, obtained administration. And in a suit to repeal it as obtained by surprize, it appeared to be the course of the court, never to grant it to the next of kin, until the wife is cited. The sister moved for a prohibition, and insisted that the ordinary had executed his authority. But the court held, that the ordinary could not be said to have executed his authority, having never had an opportunity to make the election which the statute of the 21 H. 8. c. 5. gives him; that it was incident to every court, to rectify mistakes they were led into by the misrepresentation of the parties; that if there was no surprize (of which the court below was judge) there ought to be a prohibition, because then the administration will have been duly and regularly granted: but here was a plain surprize, and therefore they denied a prohibition. *Str.* 911.

And it is said, that an administration may be repealed, without any sentence of revocation to be given in any spiritual court or otherwise; as, by granting a new administration. 1 *And.* 303. *L. of T.* 476.

V. Of the duty of executors and administrators in making an inventory, and getting in the effects of the deceased.

Adminiftring
before inven-
tory made.

1. **A**T the time of probate or administration granted, it is required that the executor or administrator produce an inventory of the goods chattels and credits of the deceased; and at the same time he maketh oath, that he will exhibit such (further) inventory into the court, as he shall thereafter be lawfully required to do.

And it is said, that if an executor, without making an inventory, shall intermeddle himself with the administration of the goods of the deceased (except in certain cases, as for the expences of the funeral, for insinuation of the testament, for making the inventory, for the necessary preservation of the goods) he shall be bound to answer to every one of the *creditors* his whole debt. *Swin.* 228, 229. *Athon* 176.

Also it is said, that every *legatary* may recover his whole legacy at his hands: for in this case the law presumeth, that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same. Whereas otherwise, the executor is presumed not to have any more goods which were the testator's, than are described in the inventory, the same being lawfully made. *Swin.* 228, 229. *Toth.* 183. *12 Mod.* 346.

And therefore if any creditor or legatary doth affirm, that the testator had any more goods than are comprized in the inventory; he must prove the same: otherwise the judge is to give credit to the inventory, being made in due form of law. *Swin.* 426.

And such executor is also further punishable at the discretion of the ordinary, by the constitution here next following; and therefore it concerneth the executor, that he do not administer the goods of the deceased, until he hath caused an inventory to be made: for howsoever the act of him that is named executor is said to hold in law, before the proving of the will and the making of the inventory; nevertheless he that so presumeth to meddle and administer as executor before he maketh an inventory, is subject to ecclesiastical punishment; unless it be for doing such things as cannot be deferred till the inventory be made; as, for intermeddling about the funeral, or disposing of such things as cannot be preserved by keeping, or such like. *Swin.* 424.

Laws requi-
ring the ma-
king an in-
ventory.

2. By a constitution of Othobon; *The executors of testaments, before they shall intermeddle with the administration of the goods, shall make an inventory in the presence of some credible persons, who shall competently understand the value of the deceased's goods; and the same shall exhibit unto the ordinary: and if any shall presume to administer, without such inventory made; he shall be punished by the discretion of his ordinary.* *Athon* 176.

And

And by a constitution of archbishop Stratford, it is ordered as follows: *We do enjoin, that no executor of any testament shall be permitted to administer of the testator's goods, unless he first make a faithful inventory of the said goods; the funeral expences, and the expences about the inventory only excepted. And the same inventory shall be delivered to the ordinary, within a time to be appointed by his discretion.* Lind. 176.

And by the statute of the 21 H. 8. c. 5. *The executor and executors named by the testator, or person deceased, or such other person or persons to whom administration shall be committed where any person dieth intestate or by way of intestate, calling or taking to him or them such person or persons, two at the least, to whom the person so dying was indebted, or made any legacy; and upon their refusal or absence, two other honest persons, being next of kin to the person so dying; and in their default and absence, two other honest persons; and in their presence, and by their discretions, shall make or cause to be made a true and perfect inventory of all the goods, chattels, wares, merchandises, as well moveable as not moveable whatsoever, that were of the said person so deceased: and the same shall cause to be indented; whereof the one part shall be by the said executor or executors, administrator or administrators, upon his or their oath or oaths to be taken before the said bishops or ordinaries, their officials or commissaries, or other persons having power to take probate of testaments, to be good and true, delivered into the keeping of the said bishop, ordinary or other person as aforesaid; and the other part thereof to remain with the said executor or executors, administrator or administrators. And no bishop, ordinary, or other whatsoever person having authority to take probate of testaments, on pain in this statute contained, shall refuse to take such inventory to him presented or tendred to be delivered as aforesaid.* f. 4.

3. By goods in the aforesaid constitutions and statute, are included all the testator's cattle, as bulls, cows, oxen, sheep, horses, swine, and all poultry, household stuff, money, plate, jewels, corn, hay, wood severed from the ground, and such like moveables. *Law of Test.* 379.

Things to be put into the inventory: — Goods.

4. *Chattels* comprehend all goods, moveable and immoveable; except such as are in nature of freehold, or parcel of it. And chattels are either *personal* or *real*: *Personal* are such as belong immediately to the person of a man; and for which, if they be any way injuriously withheld from him, he hath no other remedy but by personal action: *Chattels real* are such as either appertain not immediately to the person, but to some other thing by way of dependency, as a box with charters of land; or such as are issuing out of some immoveable thing, as a lease, or rent for term of years; and chattels real concern the realty, lands and tenements, interest in advowsons, in statutes merchant, and the like. *1 Inst.* 118.

Chattels.

But *fishes* in a pond, *conies* in a warren, *deer* in a park, *pigeons* in a dove house, where the testator had the inheritance, or but for life, in the pond warren park and dove house; are not chattels at all, nor go to the executor, but to the heir with the inheritance: and therefore they are not to be put into the inventory of the goods and chattels of the party deceased. *Went.* 52. *Swin.* 422. But if the testator have any tame pigeons, deer, rabbits, pheasants, or partridges, they shall go to the

the

the executors; and tho' they were not tame, yet if they were kept alive in any room, cage, or such like place: so fish in a trunk; also young pigeons, tho' not tame, being in the dove house, and not able to fly out. *Law of Test.* 379.

Also *bounds, greybounds, spaniels*, and the like, as they may be valuable, and may serve not only for delight, but for profit, shall go to the executors. *Law of Test.* 379.

Debts owing
by the de-
ceased.

5. *Debts, which the deceased owed to others*; ought not to be put in the inventory: because they are not the goods of the deceased, but of other persons. *Lind.* 176. Yet they may be put in, if it shall seem expedient. *id.* — And this the rather, in case the clear value of the goods and chattels (the debts owing by the deceased being deducted) shall not exceed the sum of 40l; thereby the better to ascertain the mortuary.

And if these debts shall be put into the inventory; the ordinary shall do well to make diligent examination, whether the testator did owe any such: that thereby the legataries, and children of the deceased, and others, may not be defrauded of their just due, by any false pretence thereof. *Swin.* 423.

Debts owing
to the de-
ceased.

6. *Lindwood* says, that *debts owing to the deceased*, of which there is not any *writing or obligation*, ought not to be put into the inventory before they be received; because before that, they are not found to be debts, at least so as they may be handled or taken hold of. But afterwards when such debts are received, they ought to be put into the inventory as goods newly accruing. *Lind.* 176.

But unless they be bad debts, it seemeth best to insert them; and even if they be bad debts, or desperate, yet they may be inserted, specifying them as such. And if in the course of administration they shall be recovered, then they shall be accounted for in like manner as the rest of the personalty; and if they cannot be recovered, or so much of them as cannot be recovered, shall not be accounted for as any part of the goods of the deceased.

Leases.

7. All *leases* for years the executor shall have; and therefore leases ought not to be omitted forth of the inventory. *1 Roll's Abr.* 915. *Swin.* 421.

If a devise be of land to one and the heirs of his body for 500 years; this is a lease for years, and therefore the executor shall have it: And the reason is, because an estate tail cannot be made of a term. *1 Roll's Abr.* 915.

Execut.

8. Also the executor shall have all lands *extended* on any judgment, statute, or recognizance. *Law of Test.* 378.

Rent.

9. Also the executor shall have all arrearages of *rent* due at the death of the testator; and therefore the same shall be put in the inventory. *Law of Test.* 378.

Corn or other
things grow-
ing.

10. *Corn* growing upon the ground, ought to be put into the inventory; seeing it belongeth to the executor: but not the grass or trees so growing; which belong to the heir, and not to the executor. *Swin.* 421.

Also *beps*, tho' not sown, if planted; and *saffron*, and *bemp*, because sown; shall go to the executors. *Law of Test.* 380.

But Mr Wentworth thinks, that *roots* in gardens, as carrots, parsnips, turneps, skirrets, and such like, shall not go to the executor, but to the heir; because they cannot be taken without digging and breaking the soil. *Went.* 61, 62.

But lord Coke says, that if the testator shall set roots, his executors shall have that year's crop. *1 Inst.* 55.

If a man be seised for life or in fee or tail in his own right, or in the right of his wife, or for years in the right of his wife, and sows the ground with corn, but dies before it is ripe; his executors shall have it, and not the wife or heir: But grass ready to be cut for hay, apples, pears, and other fruit on the trees, shall not go to the executors. And the reason of the difference is, because the former comes not merely from the soil, without the industry or manurance of man, as the latter doth. *Law of Test.* 379.

Yet if a lessee at will sows the land with *hay seed*, and by this increases the grass, and the lessor enters and ejects him, the lessee shall not have it. *1 Inst.* 56.

But for *clover*, *saint foin*, and the like, the reason of manurance, labour, and cultivation is the same as for corn; but no case hath occurred, wherein these matters have come in question; this kind of husbandry having been in use only of late years.

If the wife had a lease for years as executrix, and the husband sows the ground with corn, and dies before it is ripe; the corn shall go to his executors, at least so much as is more than the yearly rent of the land: But if the husband and wife were joint tenants of the land; she shall have the corn, and not his executors. *Law of Test.* 380.

If a parson sows his glebe land, and dies before severance; and after, his successor is admitted instituted and inducted before the corn is cut: it shall go to the executors or administrators of the deceased, who must pay tithes thereof to the successor. *1 Roll's Abr.* 655.

II. Things that are affixed to the tenement, and are made parcel of the freehold, ought not to be put in the inventory; because these belong to the heir, and not to the executor. *Swin.* 421. Things fixed to the freehold.

And therefore the *glass* annexed to the windows of the house, because they are parcel of the house, shall descend as parcel of the inheritance to the heir, and the executors shall not have it. And altho' the lessee himself, at his own cost, do cause the glass to be put into the windows, yet the same being parcel of the house, he cannot take the same away afterwards, without danger of punishment for waste. Neither is there any material difference in law, whether the glass were annexed to the window with nails, or in other manner, either by the lord or by the tenant; for being once affixed to the freehold, the same cannot be removed by the lessee, but shall belong to the heir, and not to the executors: and therefore the same is not to be put into the inventory, as part or parcel of the goods of the deceased. *Swin.* 421.

The

The like may be concluded of *wainscot*; that it ought not to be put into the inventory, as parcel of the goods of the deceased: for being annexed unto the house, either by the lessor or by the lessee, it is parcel of the house. And there is no difference whether it be affixed with great nails or little nails, or by screws, or irons thrust thro' the posts or walls of the house; for howsoever it be affixed, either in manner aforesaid, or in any other manner, it is parcel of the freehold, and if the executors should remove it, they are punishable for the same. *Swin.* 421.

And not only glass and wainscot, but any other such like thing, affixed to the freehold, or to the ground, with mortar and stone, as *tables dormant, leads, manglers*, and such like; for these belong to the heir, and not to the executor: and therefore they are not to be put into the inventory of the deceased's goods. *Swin.* 421.

So also of *mill-stones, anvils, doors, keys, window shutters*; none of these be chattels, but parcel of the freehold, or thereto pertaining; and therefore shall not go to the executors. *Went.* 61.

An executor taking away a *furnace*, which was set in the middle of an house, and not fixed to any wall; the heir brought an action of trespass against him: and it was adjudged for the heir, that this should go as part of the freehold and inheritance of the heir. But in the case of *Day and Austin*, *Walmesley* said, that lord *Dyer's* opinion was, that where the furnace is not affixed to the wall, the lessee might within his term take it away; but not if it was fixed to the wall, for there it would strengthen the house. *Law of Test.* 380.

Pictures and glasses, tho' generally speaking, not part of the freehold, yet if put up instead of wainscot, or where otherwise wainscot would have been put, shall go to the heir; for the house ought not to come to the heir maimed or disfigured. 2 *Vern.* 508. *Law of Test.* 380, 381.

But in the case of *Harvey and Harvey*, *M.* 14 *Geo.* 2. In trover by the executor against the heir; it was held by Lee chief justice, that *hangings, tapestry, and iron backs* to chimnies, belonged to the executor; who recovered accordingly against the heir. *Str.* 1141.

And the law seemeth now to be held not so strict as formerly; and if these things can be taken away without prejudice to the fabrick of the house, it seemeth that the executor shall have them; as tables, altho' fastened to the floor; furnaces, if not made part of the wall; grates, iron ovens, jacks, clock cases, and such like, altho' fixed to the freehold by nails or otherwise.

Heir looms.

12. But if a man be seised of a house, and possessed of divers heir-looms, that by custom have gone with the house from heir to heir; it seemeth that these altho' no part of the freehold, shall go to the heir, and not to the executor; and therefore ought not to be put into the inventory. 1 *Inst.* 185.

So if an incumbent enter upon a parsonage house, in which are hangings, grates, iron backs to chimnies, and such like, not put there by the last incumbent, but which have gone from successor to successor; the

the executor of the last incumbent shall not have them, but it seemeth that they shall continue in the nature of heir-looms: but if the last incumbent fixed them there only for his own convenience; it seemeth that they shall be deemed as furniture, or household goods, and shall go to his executor.

13. Writings, and evidences, which touch the inheritance, shall go to the heir, and not to the executor. *Went.* 62. Box with writings.

And *Swinburne* says, that a box ensealed, or the chest with evidence of the land, tho' the same be not affixed to the freehold, yet because they contain those things which belong to the heir, they also belong to the heir, and not to the executors: and therefore they are not to be put into the inventory of the deceased's goods. *Swin.* 421.

But as to this, *Rolle* makes a distinction, and saith, If the writings which concern the inheritance are in a chest; the executors shall have the chest, and the heir the writings. But if the chest be shut, the heir shall have the chest also; but if it be not shut, the executor shall have the chest. 1 *Roll's Abr.* 915.

But the author of the *Law of Testaments* observeth, that this distinction seemeth not to be well taken; for if it be a box purposed for the keeping of the deeds, the heir ought to have it whether locked or open: on the other hand, if it be a box designed for other use, as for the keeping linen; it cannot be said to be appurtenant to evidences, altho' some be in it, for so may other things also; or perhaps it may be a chest or cabinet of great value, surely this shall not go to the heir, when perhaps there is not personal estate sufficient to pay the testator's debts. *Law of Test.* 381.

If a further distinction seemeth necessary, it might be this: that if the executor will not open the box and deliver the writings, the heir rather than not have the writings may take the box also; but if the executor will deliver the writings, and retain the box, it doth not seem that one box more than another can be said to be appurtenant to writings, so as to devert the property thereof out of the executor.

14. By the 21 *H. 8. c. 5. f. 5.* If the person deceased shall devise any profits of lands tenements or hereditaments to be sold, neither the money thereof lands to be coming, nor the profits of the said lands for any time to be taken, shall fold. be accounted as any of the goods or chattels of the said person so deceased.

15. But what shall we say to those goods, which may seem to belong Wife's Paraphernalia. to the wife rather than to the husband, as her apparel, her bed, her jewels, or ornaments for her person; whether are they to be put into the inventory of the husband's goods, yea or nay? By the civil law, those belonging to the wife, which be called *bona paraphernalia*, are not to be put into the inventory of her husband's goods, neither are they subject unto the payment of the husband's debts: But whether the wife's apparel, with her bed, jewels, and ornaments for her person be comprehended amongst those goods which the law calleth *bona paraphernalia*, is the matter in question. And it seemeth rather that they are not (saith

Swinburn); her convenient apparel, agreeable to her degree, only excepted. Otherwise, whatsoever goods belong to the wife, are presently by virtue of the marriage become the husband's, the property thereof being changed and transferred from the wife to the husband. Inasmuch that without her husband's licence or consent, she cannot dispose thereof, neither by act in her life time, nor at her death by her last will, which she might do if they were bona paraphernalia; wherefore those goods being the husband's and not the wife's, and the property thereof being in him and not in her, it may be concluded, that in construction of law, those goods abovementioned, and namely the wife's jewels, chains, and borders are to be put into the inventory of the deceased husband's goods. *Swin. 422.*

Rolle says, The wife after the death of her husband shall have convenient apparel for her body, and not the executors of her husband; and of this convenience the court must be the judge. But she shall not have excessive apparel; and if she takes more than is convenient, she shall be taken to be an executor of her own wrong. *1 Roll's Abr. 911. Law of Test. 383, 384.*

And if the husband deliver to his wife a piece of cloth for to make a garment, and dieth; altho' that this was not made into a garment in the life of the husband, yet the wife shall have this, and not the executor of the husband; inasmuch as it was delivered to her to this intent: but against the debtee of the husband, the wife shall have no more apparel than is convenient. *1 Roll's Abr. 911.*

But in the case of *Hastings and Douglass, H. 9 Cha.* A chain of diamonds and pearl, worth 370 l, usually worn by Sir John Davis's wife, who was daughter of the earl of Castlehaven, being by her husband's will devised from her; Berkeley and Jones were of opinion, that she being the daughter of a nobleman, and permitted to use them frequently as ornaments of her person, and they being convenient for her degree, she should have them as her paraphernalia; and when there are not debts to be paid (as it doth not appear that there are any in this case), she shall have them against the executors or administrators of her husband, and the husband cannot dispose of them from his wife by his will; but instantly by his death, the possession of them being in the wife's custody, the property is vested in her, and the husband cannot give them away; for it is not reasonable the husband should leave her naked of those jewels which she usually did wear, and are fit according to her calling to wear. But Richardson and Croke were of opinion, that the will was good, and that she may not take them contrary to the devise; but if the husband had not made his will of them, but had left them to the disposition of the law, and the question had been betwixt the executor or administrator and the wife, where there be not any debts or legacies to be paid, or where there be assets to pay all debts and legacies besides those jewels; there peradventure, the law will allow her to take, and to enjoy them as her paraphernalia. *Cro. Car. 343. 1 Roll's Abr. 911.*

And

And in the case of *Cary and Appleton*, M. 26 C. 2. The husband devised the jewels, which were the paraphernalia of the wife, and died: They were decreed to the wife. 1 *Cha. Ca.* 240.

And by Macclesfield lord chancellor: Bona paraphernalia are not devisable by the husband from the wife, any more than heir looms from the heir; so that the right of the wife to her paraphernalia is to be preferred to that of a legatee. 1 *P. Will.* 730.

But it is said, that bona paraphernalia shall not be retained by the wife against debts. And in the case of *Stubbs and Stubbs*, H. 31 C. 2. it was held, that where the real estate is chargeable, together with the personal, for the payment of debts, and the personal estate is deficient, the bona paraphernalia shall be liable before the real estate shall come in. *Cha. Ca. Finch.* 415.

But in the case of *Tipping and Tipping*, M. 1721. By Macclesfield lord chancellor: Bona paraphernalia are liable to debts in favour of creditors only, and not in favour of the heir at law. 1 *P. Will.* 730.

And if creditors of the testator by judgment take the jewels after his death in execution, when the heir or executor or trustees have other assets sufficient to pay such debts; this is a default in the trustees, for which the widow ought not to suffer as to her bona paraphernalia. 2 *P. Will.* 80.

But where a daughter's portion was to be paid out of her father's personal estate; the court would not allow the widow to retain her paraphernalia. *Cha. Ca. Finch.* 146.

And where by marriage articles it was agreed, that the wife should have no part of the husband's personal estate, but what he should give her by his will; it was declared by the court, that this bars her of her paraphernalia, and from jewels given to her by her husband in his life time. 2 *Vern.* 83.

Yet notwithstanding all that hath been said, if we shall respect what hath been used and observed, such hath ever been the general and ancient custom or rather courtesy of the province of York, as thereby widows have been tolerated, to reserve to their own use, not only their apparel, and a convenient bed, but a coffer with divers things therein necessary for their own persons; which things have been usually omitted out of the inventory of their deceased husband's goods, unless peradventure the husband was so far indebted, as the rest of his goods would not suffice to discharge the same; in which case the wife's jewels, chains, and borders, and such like, being things of decency or ornament, and not of necessity, have been usually prized and put into the inventory amongst other goods of the deceased, towards the payment of his debts; and so they ought to be. *Swin.* 422.

16. Goods to which the husband is intitled in right of his wife, and Wife's goods as administrator to her, are not to be put in the inventory after her death; but things which are in action must be put in. *Swin.* 422. *God. O. L.* 153.

In the case of *Sir John St John*, T. 15 Cha. the lady C was possessed of divers leases, and conveyed them in trust, and afterwards married with A B. The lady received the money upon the leases, and with part of the money bought jewels, and other part of the money she left, and died. A B takes letters of administration of the goods of his wife; and in a suit in the ecclesiastical court, the court would have compelled him to have given an account of the jewels, and for the monies, to have put them into the inventory. But the opinion of the whole court of king's bench was, that he should not put them into the inventory; because the property of the jewels was absolutely in him as husband, and he had them not as administrator: but such things as be in action, and which he shall have as administrator, he shall be accountable for, and they shall be put into the inventory. And for the money received upon trust, it was resolved, that the same was the money of the trustees, and the wife had no remedy for it but in equity; and therefore the husband shall have it as administrator. And in that case it was resolved, that if a woman do convey a lease in trust for her use, and afterwards marrieth, in such case it lieth not in the power of the husband to dispose of it; and if the wife die, the husband shall not have it. *Mar. 44. Swin. a. 423.*

Valuation.

17. By the aforesaid constitution of *Othobon*, the inventory shall be made in the presence of some credible persons, who shall *competently understand the value of the deceased's goods*: for it is not sufficient to make an inventory, unless the goods therein contained be particularly valued and appraised by some honest and skilful persons, to be the just value thereof in their judgments and consciences, that is to say, at such price as the same may be sold for at that time. *Swin. 425, 426.*

But as to the value of the goods upon the appraisement, it is not binding, nor very much regarded at the common law; for if it is too high, it shall not be prejudicial to the executor or administrator; and if it be too low, it shall be no advantage to him: but the very value found by the jury, when it comes in question whether the executor hath fully administered, or hath assets or not, is that which is binding. *Swin. 426. Went. 83, 84.*

In what cases
an inventory
may be dis-
pensed withal.

18. By the aforesaid constitution of archbishop *Stratford*, the inventory shall be *delivered to the ordinary, within a time to be appointed by his discretion*. — Not arbitrarily (saith *Lindwood*) but in a reasonable manner, according to the exigency of persons, things, and places. *Lind. 177.*

And as the time for exhibiting such inventory, is left to the discretion of the ordinary; so may he remit the making of an inventory, for a reasonable cause: as where it may be expedient, that the quantity of the goods should not be divulged. *Lind. 176.*

As was done in *Boon's* case, July 18. 1682. Who dying possessed of a large personal estate, made his eldest son executor, and among other bequests, gave his second son 2000l, to be paid at three several payments. The said second son took out process against the eldest brother, and caused him to be cited before the judge of the prerogative court (where

(where the will was proved) in order to compel him to bring in an inventory. But it appearing to the judge, that the two first payments were made, and the third offered to be made; he gave sentence, that there was no need of an inventory at the instance of the plaintiff: which was confirmed by the delegates, first upon appeal, and afterwards upon a commission of review. *Raym.* 470.

19. Altho' appraisements and inventories shall not be made according to the ecclesiastical law, nor to the statute aforesaid; yet, by the practice of the courts, if the goods of the deceased shall be appraised by any honest persons of the neighbourhood, and reduced into an inventory, and afterwards the said inventory shall be in due time exhibited before the judge who proveth the will or granteth the administration, upon the oath of the executor or administrator, such inventory shall receive credit in all causes and courts, and he that exhibiteth the same shall be freed from the burden of proving the truth of the inventory, that is, that the deceased had no more goods; and he retorteth the proof of any goods having been omitted, upon the legatary or other person pretending interest in the goods of the deceased. *1 Ought.* 344.

How far the strict formalities before required, are necessary.

By which oath of the executor or administrator is to be understood, the oath which he took at the time of granting the probate or administration: Unless the party be called afterwards to exhibit an inventory upon his corporal oath; for then he shall again take a special oath of the truth of the inventory, notwithstanding the former general oath that he took at the time of granting the probate or letters of administration. *id.*

20. For sometimes it is demanded, and by the judge decreed, at the instance of the party having interest in the goods of the deceased, that an inventory be exhibited upon the oath of the executor or administrator, before the issuing of the probate or letters of administration under seal: and then, notwithstanding the former general oath had been taken for the faithful execution of the will or administering the goods of the deceased, and for exhibiting a true inventory, a special oath hath been used to be taken, at the time of exhibiting the inventory, of the truth thereof; and that, either personally, or by virtue of a commission. *1 Ought.* 344.

Strictness requisite in contestation of suit.

And sometimes, before the granting, or at least before the issuing of the probate or letters of administration, (instead of an inventory of the goods of the deceased upon the oath of the party,) at the request of some person having interest, the judge issueth a commission for the appraisement and true valuation of the goods rights and credits, and inspection of the obligations, leases, and other writings and papers whatsoever, concerning the personal estate of the deceased, at the house of the deceased, or elsewhere, wheresoever his goods rights or credits remain or be, on such day or days, with continuation and prorogation of the time and place, as shall be needful. *id.*

Also in these cases, there usually issueth a monition against the other party in special, and all others in general, with whom any of the goods rights or credits of the deceased remain and be, that they exhibit or shew,

shew, or cause to be exhibited or shewed, really and with effect, to the appraisers by virtue of the commission aforesaid appointed, at the time and place of the execution thereof, the aforesaid goods rights and credits of the said deceased, and also the bonds, leases, and other writings and papers, concerning the personal estate of the deceased, remaining or being with them or any of them, to the end that they may be appraised and put in the inventory: on pain of law, and of contempt. *1 Ought. 344, 5.*

And such commission being duly executed, the inventory is brought in and exhibited, signed by the hands of the commissioners or appraisers or two of them at the least; without the oath of the party for the truth thereof. *1 Ought. 345.*

And in such cases an inventory also is often required upon the oath of the executor or administrator, of such goods of the deceased as have been already disposed of. *id.*

Action given
to executors.

21. By the 13 Ed. 1. ft. 1. c. 23. *Executors shall have a writ of account, and the same action and process in the same writ, as the testator might have had if he had lived.*

By the common law, executors should not have an action of account, for an account to be made to the testator, because the account rested in privity; for remedy whereof this act was made. But by the law of merchants, an action of account did lie for executors. *2 Inst. 404.*

By the 4 Ed. 3. c. 7. *Whereas in times past, executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted, that the executors in such cases shall have an action against the trespassers, and recover their damages, in like manner as they whose executors they be should have had if they were in life.*

By the 25 Ed. 3. ft. 5. c. 5. *Executors of executors shall have actions of debts, accounts, and of goods carried away of the first testators, and executions of statutes merchants and recognizances made in court of record to the first testator, in the same manner as the first testator should have had if he were in life; and the same executors of executors shall answer to other of as much as they have recovered of the goods of the first testators, as the first executors should do if they were in full life.*

Action given
to admini-
strators.

22. By the statute of the 31 Ed. 3. ft. 1. c. 11. *In case where a man dieth intestate; the persons deputed by the ordinary to administer his goods, shall have an action to demand and recover as executors, the debts due to the person intestate in the king's court, for to administer and dispend for the soul of the dead; and shall answer also in the king's court, to other to whom the dead person was holden and bound, in the same manner as executors shall answer: and they shall be accountable to the ordinary, as executors be in the case of testament, as well of the time past as the time to come.*

Before this act, by the common law, administrators had no property in the goods and chattels as executors had; nor could they recover debts as executors could do; but by this statute they are enabled in both those respects: and further, whereas by the common law they were charged by

by the name of executors, now they shall be charged by the name of administrators. *Gibbs. 478.*

23. By the 32 H. 8. c. 37. Forasmuch as by the order of the common law, the executors or administrators of tenants in fee simple, tenants in fee tail, and tenants for term of life, of rents services, rent charges, rent secks, and fee farms, have no remedy to recover such arrearages of the said rents or fee farms as were due unto the testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may distrain or have any lawful action to levy any such arrearages of rents or fee farms, due unto him in his life time as is aforesaid; by reason whereof the tenants of the demean of such lands tenements or hereditaments, out of which such rents were due and payable, who of right ought to pay their rents and farms at such day and terms as they were due, do many times retain such arrearages in their own hands, so that the executors and administrators of the persons to whom such rents or fee farms were due, cannot have or come by the said arrearages of the same, towards the payment of the debts, and performance of the will of the said testators; it is enacted, that the executors and administrators of every such person to whom any such rent or fee farm shall be due, and not paid at the time of his death, shall have an action of debt for all such arrearages, against the tenant that ought to have paid the same, or against his executors or administrators; or may distrain for the same upon the lands and other hereditaments chargeable therewith, so long as they continue in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent or fee farm so being behind, to the said testator in his life; or in the seisin or possession of any other person claiming the same only from the same tenant by purchase, gift, or descent; in like manner and form as the testator might have done in his life time, and shall for the same distress lawfully make avowry upon their matter aforesaid. *§. 1.*

Provided, that this shall not extend to any such manor, lordship, or dominion in Wales, or in the marches of the same, whereof the inhabitants have used time out of mind to pay unto the lord or owner thereof at his first entry into the same, any sum for the redemption and discharge of all duties forfeitures and penalties, whereof the said inhabitants were chargeable to any of their said lord's ancestors or predecessors before his said entry. *§. 2.*

And if any man having in the right of his wife any estate in fee simple, fee tail, or for term of life, in any rents or fee farms, and the same shall be due and unpaid in the said wife's life; the husband after the death of his wife, his executors and administrators, may have an action of debt for the said arrearages, against the tenant of the demesne that ought to have paid the same, his executors or administrators; or may distrain for the same, as he might have done if his wife had been living, and make avowry upon his matter as aforesaid. *§. 3.*

And if any person shall have any rents or fee farms for term of life of any other person, and the same shall be due and unpaid in the life of such other person, and he die; then he to whom the same was due, his executors or administrators, may have an action of debt against the tenant in demesne, that ought to have paid the same when it was first due, his executors and administrators; or may distrain for the same upon such lands and tenements out of

of which the said rents or fee farms were issuing and payable; in like manner and form as he might have done, if such person by whose death the aforesaid estate in the said rents and fee farms was determined and expired had been in full life; and the avowry for the taking of the same distress to be made as aforesaid. s. 4.

And by the statute of the 11 G. 2. c. 19. *Whereas where any lessor or landlord, having only an estate for life in the lands tenements or hereditaments demised, happens to die before or on the day on which any rent is reserved or made payable, such rent or any part thereof is not by law recoverable, by the executors or administrators of such lessor or landlord; nor is the person in reversion intitled thereto, any other than for the use and occupation of such lands tenements or hereditaments, from the death of the tenant for life, of which advantage hath been often taken by the under tenants, who thereby avoid paying any thing for the same; for remedy thereof it is enacted, that where any tenant for life shall happen to die before or on the day, on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of such tenant for life, that the executors or administrators of such tenant for life shall and may, in an action upon the case, recover of and from such under tenant or under tenants of such lands tenements or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due, as aforesaid; making all just allowances, or a proportionable part thereof respectively.* s. 15.

In what courts to be brought.

24. An executor may sue another in the spiritual court, touching his testator's goods, in this case, viz. if a man devise or bequeath corn growing, or goods, unto one; and a stranger will not suffer the executor to perform the testament: for this legacy, he shall sue the stranger in the spiritual court. *Swin. 18.*

But if a man take from the executor or administrator the goods of the deceased; for this they must use their action of trespass, and not sue in the spiritual court: for they cannot sue for the goods of the deceased in a court ecclesiastical, but at the common law. *Swin. 18. 10 Mod. 21.*

Also tenants may be sued at the common law by executors or administrators for rent behind, and due to the testator or intestate in his life time, or at the time of his death; and they may for the same distrain the land charged with the rent. *Swin. 18.*

In what case coexecutors must all join.

25. All the executors do represent the person of the testator, and therefore they must all join in suit against others, and in suit by others they must all be made defendants, or at least so many of them as do administer: for tho' the executors themselves must take notice by the will how many executors there be, and must frame their suit accordingly; creditors and strangers need not take notice of any more than do administer, and execute the office of executors. *Went. 95.*

T. 6 Ja. *Smith and Smith.* The mother and her son an infant were made executors, and administration was granted to her during the minority

nority of her son; she married again, and then her husband and she as executrix brought an action of debt against the defendant, who pleaded in abatement that the infant was not named; and upon a demurrer to that plea, it was held that the plea was good: but if it had been set forth specially in the declaration, that there was another executor under age, tho' not joined in the action, it might have been otherwise. *Yelv.* 130. *1 Brownl.* 101.

26. If one executor refuse to undertake the executorship, then is the other executor to be admitted alone, and may execute the will, or commence any suit, or be sued alone, as if none other had been named executor. But if he alter his mind, and afterwards become willing, then (his former refusal before the ordinary notwithstanding) he may join with the other executor who proved the will; and if he release any debt due to the testator, the release is as sufficient, as if he had never refused. Which is to be understood, if he released before judgment; but after judgment, being no party to the suit, he cannot acknowledge satisfaction, because he was not privy to the judgment. *Swin.* 325.

Case where one co-executor refuseth.

And where there are several executors, and one of them refuseth before the ordinary, and the rest prove the will; he who refused may administer when he will, and therefore they who proved it, ought to name him in every action; but if they all refuse, and the ordinary grants administration to another, then it is too late, for in such case they cannot afterwards prove the will. *9 Co.* 38. *Henslow's case.*

27. Co-executors being in law but as one person, therefore the act of one is the act of them all, and the possession of one is accounted the possession of all, and the payment of debts by or to one of them is the payment of or to all of them; and the sale or gift of the testator's goods by one, is the sale or gift of all; and likewise a release before judgment of one of them, is a release of all. *Swin.* 328.

In what case one may do what all may do.

But it is not so with administrators; for they have but one authority given them by the bishop over the goods; which authority being given to many, is to be executed by all of them joined together. *Lord Bacon's Traacts.* 162.

Also one executor shall not be charged with the wrong or devastation of his companion, and shall be no farther liable than for the assets which came to his hands. And therefore where an action was brought against two executors, and the jury found that the two and another were made executors, and that the third wasted the assets to the amount of 600 l and died, and that only 16 l came to the hands of the two others; the court held, that they should be chargeable for no more than the 16 l; for that it was the testator's folly to trust such a person, which must not turn to the prejudice of the other executors. *2 Bac. Abr.* 395.

28. Regularly, one executor cannot sue another of his co-executors, touching any thing relating to his testator's will; or that is within the power, interest, duty, or office of an executor. *2 Bac. Abr.* 396.

One executor cannot sue another.

But if the residue of the personal estate, after debts and legacies, be devised to both the executors, one of them may sue the other in the

spiritual court for a moiety; for this is in the nature of a gift or legacy to him, and he may bring trespass against the other executor if he takes it out of his possession, or detain it if he detains it from him. 2 *Bac. Abr.* 396.

Or, in such case, he may have relief in equity.

Co-executor
dying.

29. It seemeth to be now settled, that where a man maketh two executors, and deviseth to them the residue of his goods after debts and legacies paid; and one of them dieth, that the survivor shall have the whole. 2 *Lev.* 209. 1 *Vern.* 482.

So where a man devised all the rest and residue of his goods chattels and personal estate, to two persons, their executors and administrators, and one of them died; on a bill brought by his executor against the surviving devisee, it was held, that the survivor should take the whole to his own use, and should not be a trustee as to the moiety for the representative of him who is dead; and that they were to be considered as jointenants, where survivorship takes place, as well in cases of chattels, as in cases of inheritance. 1 *Abr. Ca. Eq.* 243.

Executor of
an executor.

30. The executor of an executor (where there is no joint executor) is executor to the first testator, and hath right to all the profit, and is liable to all the charge that the first executor had, or was subject unto. But the one testator's goods shall not stand charged for the other testator's debts, but each for his own. *Swin.* 329.

If two be appointed executors, and the one maketh his testament, wherein he nameth his executor, and dieth, his co-executor surviving; in this case, the executor of the executor is not to be joined with the executor surviving, neither in the execution of the will, nor in suits or actions. And if the executor of the executor have any goods or chattels in his hand, which did belong to the first testator, the executor of the same testator surviving may have an action against the executor of the executor for the same: for the power of the executor who died first was determined by his death, the other then surviving. *Swin.* 324, 325.

Swinburne says, the executor of an executor cannot sell the land of the first testator. *Swin.* 329.

But in the case of *Rolls and Mason, T.* 10 *Ja.* Where the devise was, that the executor should sell; it was held, that the executor of the executor might sell, tho' not in being at the time of the devise. 2 *Brownl.* 194.

So in the case of *Garfoot and Garfoot, M.* 15 c. 2. Lands were devised to be sold by the executor. The executor died. The youngest children, for whose benefit the sale was ordered, preferred a bill against the heir. The heir demurs; because it was but an authority in the executor, which is dead with him. But the demurrer was overruled. 1 *Cha. Ca.* 35.

Administrator
dying.

31. If administration is granted to two, and one dies, yet the administration doth not cease; for it is not like a letter of attorney to two, where by the death of one the authority ceaseth; but is rather an office; and administrators are enabled to bring actions in their own names; they come in the place of executors, and therefore the office survives. 2 *Vern.*

32. When an administrator hath judgment and dieth, his executors (as such) may not sue execution of the said judgment; for none shall have execution of this judgment, but he who shall be subject to the payment of the debts of the first intestate. 5 Co. 9. *Brudenel's case*.

Executor of
an admini-
strator.

33. By the statute of the 17 C. 2. c. 8. *Where any judgment after a verdict shall be had, by or in the name of any executor or administrator; in such case an administrator of goods not administered may sue forth a scire facias, and take execution upon such judgment.*

Administra-
tor de bonis
non.

34. By the statute of the 9 Ed. 3. ft. 1. c. 3. *In a writ of debt brought against divers executors, they nor any of them shall have but one essoin before appearance, that is to say, at the summons or attachment; nor after appearance, they shall have but one essoin, as the testator should have had: so that all the executors do represent the person of the testator as one person.*

Actions
brought a-
gainst divers
executors.

And tho' the sheriff do answer at the summons, that some of them have nothing whereby he may be summoned; yet there shall be an attachment awarded upon them. And if the sheriff answer, that he hath nothing whereby he may be attacked; the great distress shall be awarded, so that at the great distress returned upon them, he or they that do first appear in the court shall answer to the plaintiff. And altho' some of them have appeared in the court, and make default at the day that the great distress is returned upon the other; yet nevertheless he or they shall be put to answer, that first appeared at the great distress returned.

And in case the judgment pass for the plaintiff; he shall have his judgment and execution against them that have pleaded, according to the law heretofore used, and against all other named in the writ, of the goods of the testator, as well as if they had all pleaded. And it is to be understood, that if any in such case will sue according to the law that hath been used heretofore, he may freely do it notwithstanding this statute.

35. In all actions brought by executors or administrators, upon contracts, bonds, or other things made to the deceased, or for goods taken away in his life; they shall pay no costs by any statute. *Law of Ex. 462. 2 Bac. Abr. 446.*

Costs.

That is to say; costs by the common law are not given in any case: and executors and administrators are not comprized within the several statutes which in order to prevent vexatious suits do require other persons to pay costs in like cases; for executors and administrators cannot so well be supposed to intend vexation, seeing that they sue only in the right of another, and have not perhaps so perfect knowledge of the matter as their testator or intestate would have had if he had lived.

But an executor defendant shall pay costs; and the judgment is, of the goods of the testator, if there are sufficient; if not, of the executor's own goods. Also, when he is defendant, and there is judgment for him, he shall have his costs. 1 Bac. Abr. 517. 2 Bac. Abr. 446.

H. 12 G. 2. Marsh and Yellowly. When an executor must declare as executor, he shall pay no costs: but if the cause of action ariseth in the time of the executor, and is therefore a matter within his knowledge, and for which he may declare in his own right, and need not to declare as executor; he shall be liable to pay costs. *Str. 682, 1106.*

So where the thing in dispute is matter, not of fact, but of law, and consequently as much within the knowledge of the executor or administrator as of the testator or intestate; it hath been adjudged, that where judgment is given against the executor or administrator upon demurrer; they shall pay costs. As in the case of *Frazer and Moore*, E. 1720. Bill by an administrator. The defendant demurs; and the demurrer is allowed; and the bill is dismissed with costs; and so said to be the constant course in equity, by the whole court of exchequer. *Bunb.* 63.

E. 1 G. 2. *Crutchfield and Scott*. The question was, whether in an action by an executor, the defendant should be allowed to bring money into court. And on consideration, it was held he might, and that the effect of it would be, not to make the executor pay, but only lose his subsequent costs. And the same was allowed in the case of *Baker and Turberville*, M. 3 G. Str. 796.

T. 7 G. 2. *Caswell and Norman*. An executor brought error of a judgment after a devastavit; and the court held, he ought to pay costs on affirmance. *Str.* 977.

M. 3 G. *Elwell* against *Quash* and others. There were three executors one of which gave a warrant of attorney to confess a judgment against himself and his co-executors; pursuant to which a judgment was entered against all the executors of the goods of the testator for the debt, and against the executor who gave the warrant of his own goods for the costs. Upon motion to set this aside, it was held to be ill; for executors may plead different pleas, and that which is most for the testator's advantage shall be received. And the judgment was set aside. *Str.* 20.

VI. Of the payment of debts by executors or administrators.

Ordinary
liable.

1. **B**Y the statute of *Magna Charta*, ch. 18. (which lord Coke says is in affirmance of the common law) *Where one indebted to the king shall die, the king shall be first satisfied for his debt, and the residue shall remain to the executors to perform the testament of the dead: And if nothing be owing unto the king, all the chattels shall go to the use of the dead (saving to his wife and children their reasonable parts).*

Upon which, lord Coke says, three things are to be observed: 1. That the king by his prerogative shall be preferred in satisfaction of his debt by the executors, before any other. 2. That if the executors have sufficient to pay the king's debt, the heir that is to bear the countenance, and sit in the seat of his ancestor, or any purchaser of his lands, shall not be charged. 3. If nothing be owing to the king, or any other, all the chattels shall go to the use of the dead, that is, to his executors or administrators, saving their reasonable parts to the wife and children as aforesaid.

And by a constitution of Othobon: *Since the uncertainty of death often deprives men of the opportunity of making their last wills, human piety ascribes*
mer-

mercifully towards the deceased, by distributing their goods to pious uses, so that they follow and help them, and propitiously intercede for them with the heavenly judge; Therefore we, by our approbation confirming the provision heretofore made (as it is said) by the prelates of the kingdom of England with the approbation of the king and barons, concerning the goods of such as die intestate, do strictly forbid prelates, and all other whatsoever, to take or seize the goods of intestates, contrary to the provision aforesaid. Athon. 121.

Which provision John of Athon understandeth to be that which is made by the statute of the 13 Ed. 1. c. 19. but this cannot be right; for this constitution was made seventeen years before that statute. Gibs. 478. But the provision meant, seemeth plainly to be the aforesaid statute in the magna charta.

And by a constitution of archbishop Stratford it is ordered thus: Forasmuch as it happeneth sometimes, that persons dying intestate, the lords of the fees do not permit the debts of the deceased to be paid, out of their moveable goods; we do decree, that none shall henceforth do the same, on pain of the greater excommunication.

2. By the statute of the 31 Ed. 3. ft. 1. c. 11. The persons deputed ^{Executors} by the ordinary to administer the goods of intestates, shall have an action to ^{and admini-} demand and recover as executors, the debts due to the person intestate, in the ^{strators liable.} king's court, for to administer and dispend for the soul of the dead; and shall answer also in the king's court, to other to whom the said dead person was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as the time to come.

But before this act, action laid by the common law, against the deputies or committees of the ordinary, by the name of executors, but not by the name of administrators until this act. 9 Co. 39.

By the statute of the 30 C. 2. c. 7. The executors and administrators of any person, who as executor in his own wrong, or administrator, shall waste or convert any goods chattels estate or assets of any person deceased to his own use, shall be liable and chargeable in the same manner, as their testator or intestate would have been if he had been living.

And by the statute of the 4 & 5 W. c. 24. Forasmuch as it hath been a doubt whether the said statute of the 30 C. 2. did extend to the executors and administrators of any executor or administrator of right, who for want of privity in law were not before answerable nor could be sued for the debts due from the first testator or intestate, notwithstanding that such executors or administrators had wasted the goods and estate of the first testator or intestate, or converted the same to their own use; it is hereby declared, that all and every the executors or administrators of such executor or administrator of right, who shall waste or convert to their own use goods chattels or estate of their testator or intestate, shall be liable and chargeable in the same manner as their testator or intestate should or might have been. f. 12.

Dr Swinburne says, If a testator by his testament doth charge his executor to pay his debts; the creditors, in respect of such charge, may sue for them in the ecclesiastical court. Swin. 19.

But

But this (as it seemeth) must be understood, where there are special words in the will so directing it; as if the testator leave to his creditor such a sum in lieu and satisfaction of his debt, or the like: Otherwise, the suit must be (as for other debts) in the temporal courts.

Devisee and
heir at law of
lands liable.

3. By the statute of the 3 W. c. 14. *Whereas it is not reasonable or just, that by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts; and nevertheless it hath often so happened, that where several persons having by bonds or other specialties bound themselves and their heirs, and have afterwards died seised in fee simple of and in manors messuages lands tenements and hereditaments, or had power to dispose of or charge the same by their wills or testaments, have (to the defrauding of such their creditors) by their last wills or testaments devised the same, or disposed thereof in such manner, as such creditors have lost their said debts: for remedying of which, and for the maintenance of just and upright dealing, it is enacted, that all wills and testaments limitations dispositions or appointments, of or concerning any manors messuages lands tenements or hereditaments or of any rent profit term or charge out of the same, whereof any person at the time of his decease shall be seised in fee simple in possession reversion or remainder, or hath power to dispose of the same by his last will or testament, shall be deemed and taken (only as against such creditors as asseised their heirs successors executors administrators and assigns) to be fraudulent, and clearly absolutely and utterly void frustrate and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding. §. 2.*

And in the cases before mentioned, all such creditors may have and maintain actions of debt upon their bonds and specialties, against the heir at law of the obligor and such devisee jointly; and such devisee shall be liable and chargeable for a false plea by him pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended. §. 3.

Provided, that where there shall be any limitation or appointment, devise or disposition, of or concerning any manors messuages lands tenements or hereditaments, for the raising or payment of any real and just debts, or any portions or sums of money for any child or children of any person other than the heir at law, according to any marriage contract or agreement in writing bona fide made before such marriage, the same shall be in full force; and the same manors messuages lands tenements and hereditaments shall be holden and enjoyed by every such person, his heirs executors administrators and assigns, for whom the said limitation appointment devise or disposition was made, and by his trustee or trustees their heirs executors administrators and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed; until such debt or portions shall be raised and paid. §. 4.

And whereas several persons being heirs at law, to avoid the payment of such just debts, as in regard of the lands descending to them they have by law been liable to pay, have sold aliened or made over the same before any process was or could be issued out against them; it is enacted, that in all cases where any heir at law shall be liable to pay the debt of his ancestor, in regard of any lands tenements or hereditaments descending to him, and shall sell alien or make

make over the same, before any action brought or process sued out against him; such heir at law shall be answerable for such debt, in an action of debt, to the value of the said land so by him sold aliened or made over; in which case all creditors shall be preferred as in actions against executors and administrators, and such execution shall be taken out upon any judgment so obtained against such heir, to the value of the said land, as if the same were his own proper debt; saving that the lands tenements and hereditaments bona fide aliened before the action brought, shall not be liable to such execution. f. 5.

Provided, that where any action of debt upon any specialty is brought against any heir, he may plead riens per descent at the time of the original writ brought, or the bill filed against him; and the plaintiff in such action may reply, that he had lands tenements or hereditaments from his ancestor before the original writ brought; or bill filed; and if upon issue joined thereupon it be found for the plaintiff, the jury shall inquire of the value of the lands tenements or hereditaments so descended, and thereupon judgment shall be given, and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer, or nihil dicit, it shall be for the debt and damages, without any writ to inquire of the lands tenements or hereditaments so descended. f. 6.

Provided, that every devisee made liable by this act, shall be liable and chargeable in the same manner as the heir at law by force of this act, notwithstanding the lands tenements and hereditaments to him devised shall be aliened before the action brought. f. 7.

M. 12 G. Buckley and Nightingale. An heir that hath lands by hereditary descent, shall not be liable for the debt of his ancestor further than to the value of the lands descended: and as soon as he hath paid his ancestor's debts to the value of the land, he shall hold the land discharged; otherwise he might be chargeable ad infinitum. Str. 665.

And if an heir is sued upon a bond debt of his ancestor, in which he is bound, and he pays the money; the executor shall reimburse him as far as there are personal assets of the testator's come to his hands, if it is not otherwise ordered by the will. 1 Cha. Ca. 74. 2 P. Will. 175.

So if a man mortgages lands, and covenants to pay the money, and dies; the personal estate of the mortgagor shall, in favour of the heir, be applied to exonerate the mortgage. 2 Salk. 449.

Yea, tho' there be no covenant in the deed for the payment of the mortgage money, yet the personal estate shall be liable in the hands of the executor. 2 Salk. 449. 1 Vern. 436.

If a man dies indebted by bond, and seised in fee of divers lands, part of which he devises to one, and other part he permits to descend to his heir (not mentioning them in his will); the lands permitted to descend shall be first applied to pay the bond debts. And the reason is, because the applying the devised lands to pay the bond debts, would disappoint the will; which equity will not permit, if it can be avoided: Whereas it no way disappoints the will to say, that the lands not mentioned should be in the first place liable to pay the debts. But it seems
it

it would be otherwise, if the testator had devised the lands to his heir at law; for tho' such devise were void (as to the purpose of making the heir take otherwise than by descent), yet it shews the testator's intent, that the heir should have the land; and therefore it seemeth that the lands devised to one, and the other lands devised to the heir at law, should in such case contribute in proportion to pay the bond debts. Also, for the abovementioned reason, it seemeth that the lands permitted to descend to the heir at law, and not mentioned in the will, shall be applied to pay the bond debts, before a *specific legacy*; lest otherwise the testator's intention should be disappointed. 3 *P. Will.* 367.

How far a charge upon lands for payment of debts, shall enure and be in force against purchasers of those lands from the devisee for a valuable consideration, hath been made a question. As in the case of *Elliot and Merriman, E.* 1740. *Thomas Smith* became indebted to several persons by bond, and likewise by simple contract. In three of these bonds, *Goodwin* was bound with him as surety; and afterwards *Goodwin* gave his own bond alone to one of the creditors, to whom *Smith* was bound in a single bond. *Smith* being thus indebted made his will, and in the beginning of it says, "My will is, that all my debts be paid; and I do charge all my lands with the payment thereof." After which, by another clause in the said will, he gave "all his real and personal estate to *Goodwin*, to hold to him, his heirs, executors, administrators and assigns, chargeable nevertheless with the payment of all his debts and legacies." Of this will he made *Goodwin* executor. The testator died in 1724. *Goodwin* proved the will; and in that same year sold a freehold estate of the testator's to *Hunt*; in the year following sold a leasehold of the testator's to *White*; and in 1727 sold another estate of the testator's, consisting of both freehold and leasehold, to *Merryman*. In the several deeds, by which these estates were conveyed from *Goodwin* to the purchasers, the will of *Smith* was recited; and to one of those deeds *Elliot*, a creditor of *Smith*, was a subscribing witness. These lands were sold in the neighbourhood by publick auction. At the time of these sales, the creditors all of them either lived in the town where *Goodwin* lived, or within three or four miles of it. During all this time, and till the year 1730, the creditors went on regularly, receiving their interest, which was at 5 l per cent, of *Goodwin*. *Goodwin* was a solvent man till 1732, and then he became a bankrupt. In 1734, the creditors of *Smith* brought their bill, against the purchasers of these lands, against *Goodwin*, and against the assignees under his commission of bankruptcy, in order to have a satisfaction of their debts out of those lands which were sold by *Goodwin*.—By the master of the rolls: It is almost impossible to make a determination in the present case, but that it must fall out unfortunately on the one party or the other. The dispute arising between creditors on the one side, and purchasers on the other, both these sorts of persons are intitled to the favour of this court; and in the present case, a misfortune must fall upon one of them. On whom it is to fall, is the question. And this is a question, that must so frequently have hap-

happened, that it is extraordinary to find no determination directly in point. The case is this: *Smith*, being possessed of a real and personal estate, was indebted to several persons by bond; in three of which bonds, *Goodwin* was bound with him as surety; and he had contracted likewise some other debts; and being thus indebted he makes his will, and charges his real and personal estate with the payment of his debts and legacies, and makes his devisee executor. It is true indeed, the words in the will do not amount to a devise of the lands to be sold for payment of the debts; and they only import a charge upon them for that purpose. However, this is such a devise, as is within the meaning of the proviso of the statute of fraudulent devises, and does interrupt the descent to the heir at law.—The testator died in 1724. *Goodwin* paid interest for the debts regularly till 1730. After the testator's death, three sales of this estate were made by *Goodwin*; one, of an estate which was intirely freehold; another, of an estate intirely leasehold; and a third, consisting of freehold and leasehold both. The bill in general is brought by the creditors of *Smith* against the purchasers, in order to have a payment of their debts out of the lands of *Smith*, which were sold to them by *Goodwin*.—With regard to the leasehold estate, the case is so extremely plain that the sale of that must stand, and that the creditors cannot have a satisfaction out of it, that it can admit of no manner of doubt. The executors are the proper persons, that by law have a power to dispose of a testator's personal estate. It is indeed true, that personal estate may be cloathed with such a particular trust, that it is possible the court in some cases may require a purchaser of it to see the money rightly applied. But unless there is some such particular trust, or a fraud in the case, it is impossible to say but the sale of the personal estate, when made by an executor, must stand; and that after the sale is made, the creditors cannot break in upon it.—I will now consider the other sales that have been made, and will examine them, first, upon the general rules of the court; and in the next place, upon the particular circumstances which this case is attended with. With regard to the first of these matters, the general rule is, that if a trust directs that land should be sold for the payment of debts generally; the purchaser is not bound to see that the money be rightly applied. On the other hand, if the trust directs, that lands should be sold for the payment of certain debts, mentioning in particular to whom those debts were owing; the purchaser is bound to see that the money be applied for the payment of those debts. The present case indeed does not fall within either of these rules; because here lands are not given to be sold for payment of debts, but are only charged with such payment. However, the question is, whether that circumstance makes any difference: and I think it doth not. And if such a distinction were to be made, the consequence would be, that whenever lands are charged with the payment of debts generally, they could never be discharged of that trust without a suit in this court; which would be extremely inconvenient. No instances have been produced to shew, that in any other respect the charging lands with pay-

ment of debts differs from the directing them to be sold for such a purpose; and therefore there is no reason that there should be a difference established in this respect. The only objection that seemed to be of weight with regard to this matter is, that where lands are appointed to be sold for the payment of debts generally, the trust may be said to be performed as soon as those lands are sold; but where they are only charged with the payment of debts, it may be said, that the trust is not performed till those debts are discharged. And so far indeed is true, that where lands are charged with the payment of *annuities*, those lands will be charged in the hands of the purchaser; because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund: But where lands are not burdened with such a subsisting charge, the purchaser ought not to be bound to look to the application of the money. And that seems to be the true distinction.—Having thus considered the case under the general rule, I will now consider it under the particular circumstances that attend it. And the particular circumstances are such, as are far from strengthening the plaintiff's case, but rather the contrary. One of those circumstances is, the length of time the plaintiffs have lain by, without at all insisting on any charge upon these estates. *Goodwin* was a solvent man till his bankruptcy in 1732. Here have been three purchasers of these estates, made at different times; one, in 1724; another, in 1725; and the third, in 1727. The first of them was made by *Hunt*, the second by *White*, and the third by *Merryman*. During all these transactions, the plaintiffs do not mention one word of their charge upon this estate; but, on the contrary, regularly received their interest of *Goodwin*, till the year 1730. 'Tis true indeed, that there is no express proof, that the plaintiffs knew of these purchases, but there is reason to imagine that they did. The purchases were made in the neighbourhood by publick auction. Some of the creditors lived in the same town that *Goodwin* did; and all of them lived within three or four miles of him. And *Elliot*, one of the creditors, was a subscribing witness to one of the purchase deeds. The want of notice too, on the part of the purchasers, is a considerable circumstance in their favour. It is indeed true, that they had notice that there were debts chargeable upon this estate; but it does not appear they knew to whom those debts were owing. Another circumstance is, that *Goodwin* was a co-obligor in three of these bonds, and to another of the obligees he afterwards gave his bond alone, which may well be considered as a satisfaction for that bond. By this it appears, that the creditors greatly relied upon *Goodwin* for their paymaster; and there is not much reason therefore, that they should now be allowed to resort to the testator's estate. Upon the whole, I am of opinion, that the plaintiffs bill must be dismissed, and even with costs, as against *White*; there being no manner of pretence for the plaintiffs to come upon that estate, it being all leasehold, and sold to *White* by the executor, who by law is the proper person intrusted to dispose of the
testa-

testator's personal estate. However, with regard to the rest of the defendants, I will only dismiss the bill generally, without costs. — And so it was decreed. *Barnard. Cha. Ca. 78.*

4. By the statute of the 21 H. 8. c. 4. *Whereas divers persons, having other persons seised to their uses of and in lands and other hereditaments to and for the declaration of their wills, have by their last wills and testaments willed and declared such their lands tenements or other hereditaments to be sold by their executors, as well for the payment of their debts, performance of their legacies, necessary and convenient finding of their wives, virtuous bringing up and advancement of their children to marriage, and also for other charitable deeds to be done by their executors for the health of their souls; and notwithstanding such trust and confidence so by them put in their said executors, it hath oftentimes been seen, where such last wills and testaments of such lands and other hereditaments have been declared, and in the same divers executors named and made, that after the decease of such testators, some of the said executors willing to accomplish the trust and confidence that they were put in by the said testator, have accepted and taken upon them the charge of the said testament, and have been ready to fulfil and perform all things contained in the same; and the residue of the same executors, uncharitably, contrary to the trust that they were put in, have refused to intermeddle in any wise with the execution of the said will and testament, or with the sale of such lands so willed to be sold by the testator: And forasmuch as a bargain and sale of such lands tenements or other hereditaments so willed by any person to be sold by his executors after his decease, according to the opinion of divers persons can in no wise be good or effectual in the law, unless the same bargain and sale be made by the whole number of the executors named for the same; by reason whereof, as well the debts of such testators have rested unpaid, to the great danger and peril of the souls of such testators, and to the great hindrance and many times to the utter undoing of their creditors; as also the legacies and bequests made by the testator to his wife and children, and for other charitable deeds to be done for the wealth of the soul of the same testator that made the same testament have been also unperformed, as well to the extreme misery of the wife and children of the said testator, as also to the let of performance of other charitable deeds for the wealth of the soul of the said testator, to the displeasure of almighty God: For remedy whereof, it is enacted, that where part of the executors named in any such testament of any such person so making or declaring any such will of any lands tenements or other hereditaments to be sold by his executors, after the death of any such testator, do refuse to take upon him or them the administration and charge of the same testament and last will wherein they be so named to be executors, and the residue of the same executors do accept and take upon them the care and charge of the same testament and last will; that then all bargains and sales of such lands tenements or other hereditaments so willed to be sold by the executors of any such testator by such of the executors as shall accept and take upon him or them such care or charge of administration of the same testament, shall be as good and effectual in the law, as if all the residue of the same executors named in the said testament, so refusing the administration of the same testament, had joined with him or them in the making of such bargain and sale.*

Lands devised to divers to be sold for payment of debts, one of them may sell.

In what
case the heir
may enter for
the condition
broken.

5. A man devised *his land to be sold* after his death, by his executor. One tenders to him a certain sum of money for the lands, but not to the value; and the executor afterwards held the land in his own hand two years, to the intent to sell the same dearer to some other, and took the profits all this while to his own use. Here the executor is to make the sale as soon as he can; and if he do not, the heir of the deviser may enter: for he took the profits here to his own use, not as asssets. But if a man devise, that his *executor shall sell* his land, there he may sell at any time, for that he hath but a bare power and no profit. *Litt. sect. 383.*

A person seised in fee, deviseth the land to his executors to pay his debts, and dies: if his executors pay not every debt which the testator owed upon demand, the heir of the testator may enter for the condition broken; because in law it is a devise upon condition. *1 Roll's Abr. 439.*

But the chancery may relieve, upon the payment of such debt afterwards.

Fraudulent
alienations of
goods, to
defeat credi-
tors.

6. Stratf. *All who shall give away or alienate their goods upon their death beds, to defeat their creditors, or their wives and children; and all who shall counsel the same, or assist therein, or receive the said goods; shall incur the penalty of the greater excommunication: and the giver shall not have christian burial. And no other proof shall be required, that the gift or alienation was malicious or fraudulent, but that enough doth not remain for the purposes aforesaid.* *Lind. 161.*

Fraudulent
administrations
to de-
feat creditors.

7. By the statute of the 43 El. c. 8. *Forasmuch as it is often put in ure to the defrauding of creditors, that such persons as are to have the administration of the goods of others dying intestate committed unto them, if they require it, will not accept the same but suffer or procure the administration to be granted to some stranger of mean estate, and not of kin to the intestate; from whom themselves, or others by their means, do take deeds of gift, and authorities by letters of attorney, whereby they obtain the state of the intestate into their hands, and yet stand not subject to any debts owing by the intestate; it is enacted, that every person who shall obtain any goods or debts of any person dying intestate, upon any fraud as is aforesaid, or without such consideration as shall amount to the value of the same goods or debts, or near thereabouts (except it be in satisfaction of some just and principal debt of the value of the same goods or debts to him owing by the intestate at the time of his decease); shall be charged, so far as those goods and debts will satisfy, as executor of his own wrong.*

Asssets.

8. Asssets is of two sorts; the one asssets by descent, the other asssets in hand. Asssets by descent is, where a man is bound in an obligation, and dies seised of lands in fee simple, which descend to his heir, then his land shall be called asssets (*assez, satis*) that is, enough or sufficient to pay the same debt; and by that means the heir shall be charged, as far as the land so to him descended will stretch. Asssets in hand is, when a man in like manner indebted makes executors, and leaves them sufficient to pay, or some commodity or profit is come unto them in right of their testator; this is called asssets in their hands. *Terms of the Law.*

There is also another division of assets, into *legal* and *equitable* assets: *Legal* assets are such as are liable to debts and legacies by the course of law; *equitable* assets are such as are only liable by the help of a court of equity.

So also there are *real* and *personal* assets: *Real* assets are such as concern the land; *personal* are such as concern the personal estate only.

If a man deviseth *land to be sold*; neither the money thereof coming, nor the profits of the land for any time to be taken, shall be accounted as any of the goods and chattels of such person deceased. 21 H. 8. c. 5. s. 5.

But if a man deviseth land to be sold by one for payment of his debts and legacies, and maketh the same person his *executor*, and dies; the money made by such person upon the sale of the land, shall be assets in his hands. 1 Roll's Abr. 920.

But otherwise it is, where the land is devised to be sold *by the executor and others*; for there the money shall not be assets: for they are not trusted with it as executors. 1 Roll's Abr. 920. That is, it shall not be assets at law, but it shall be assets in equity. 1 Abr. Cas. Eq. 141.

So land *articled* by the testator in his life time to be sold, is as money. 1 Salk. 154.

If there is a *mortgage* in fee, and two descents cast, and there is more due on it than the value of the land, and tho' the mortgagor says he will not redeem; yet it shall go to the executor, and not to the heir, the equity of redemption not being foreclosed or released. Tabor and Grover. M. 1699. 2 Vern. 367.

But if a mortgagee in fee enters for a forfeiture, and after some years enjoyment absolutely sells the land to J S and his heirs; this estate shall not be looked upon as a mortgage in the hands of J S, but shall go to his heir, and not to his executor. Cotton and Iles. M. 1634. 1 Vern. 271.

A man having several mortgages, one in fee, on which he entred for a forfeiture, devised those lands which were mortgaged in fee to his two daughters and their heirs, and the mortgages to them their executors and administrators. One of the daughters died: her share of the lands which were mortgaged in fee, shall go to her heir, and not to her executors; for it was the testator's intent that those lands should pass as a real estate, tho' between him and a mortgagor they were but a mortgage. Neys and Mordaunt. H. 1706. 2 Vern. 581.

If the heir of the mortgagee forecloses the mortgagor, yet the land shall go to the executor, unless the heir thinks fit to pay him the mortgage money; and then he may have the benefit of the mortgage. 2 Vern. 67.

If the lands are devised to one for life, remainder to another in fee, and the lands are charged with the payment of a sum of money, either by a former devise, rent charge, or mortgage; the tenant for life shall contri-

contribute and pay a proportionable part of such sum. *Hayes and Hayes. H. 25 C. 2. 1 Ch. Ca. 223.*

And in the case of *Cornish and Mew. H. 27 & 28 C. 2.* it was decreed, that the tenant for life should contribute one third, and he in remainder two thirds to redeem. *1 Cha. Ca. 271.*

The same day in another cause, where a jointress was of lands mortgaged, it was decreed, that the jointress paying the mortgage, should hold over till she and her executors were repaid with interest. *Bertus and Style. 1 Ch. Ca. 271.*

Also where the mortgagee devised the mortgaged lands to *A* for life, remainder to *B* in fee, and the mortgagor redeemed the land; it was decreed, that *A* should have one third, and *B* two thirds of the mortgage money. *Brent and Best. M. 1682. 1 Vern. 70.*

Lands in mortgage are devised to *A* for life, remainder to *B* in fee. *A* dies; and a bill being brought against his executors, it was held, that tho' *A* in his life time might have been compelled to contribute one third towards payment of the mortgage, in respect of his estate for life; yet his executor shall be obliged to contribute only in proportion to the time that *A* his testator enjoyed it. *Clyat and Batteson. T. 1686. 1 Vern. 404.*

When upon a mortgage, money is made payable to the heir or executor; there, before the day or at the day of payment, the mortgagor hath election to pay it to which he pleases; but after the day of payment is over, and the mortgage forfeited by law; tho' equity doth give the mortgagor relief, so as upon the payment of the money, he shall have his land, yet equity will not revive the election of the mortgagor to pay it to the heir or executor, but then he shall be forced to pay it to the executor, because it came out of the personal estate of the testator, and thither it shall return. But if in the mortgage neither heir nor executor is mentioned; then after the death of the mortgagee, the law determines it to be paid to the executor. *2 Freem. 20.*

If a man is seised of an *advowson* in fee, and the church doth become void; the void turn is a chattel: and if the patron dieth before he doth present, the *advowson* doth not go to his heir, but to his executor. *Watf. c. 9.*

If the grant of the next avoidance be to one, his heirs and assigns; yet it is but a chattel, and shall go to the executors: for where the thing it self is a chattel, the word *heirs* shall not make it an inheritance. *Watf. c. 10.*

M. 4 G. 2. Robinson and Tonge. Decreed, that an *advowson* in fee is assets in the hands of the heir for payment of debts. And the decree was affirmed in the house of lords. *Str. 879. 3 P. Will. 399.*

In the case of *Oldham and Pickering, M. 8 W.* It was adjudged, that an estate *pur autre vie*, although it be assets (by the statute of frauds and perjuries) for the payment of debts; yet it is not distributable, nor subject to the payment of legacies. *2 Salk. 464. L. Raym. 96.*

But

But by the statute of the 14 G. 2. c. 20. *Whereas doubts have arisen on the said statute of frauds and perjuries, where no devise of estates pur auter vie hath been made, to whom the surplus of such estates after the debts of such deceased owners thereof are paid shall belong, it is enacted, that such estates pur auter vie, in case there be no special occupant thereof, of which no devise shall have been made according to the said act, or so much thereof as shall not have been so devised, shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.*

If an executor has a lease for years of land, of the value of 20 l a year, rendring rent of 10 l a year; it is affets in his hands only for 10 l over and above the rent. *Cro. El. 712.*

If an executor renew, he shall account for the new lease as well as the old, for the benefit of the creditors. *2 Cha. Ca. 208.*

Affets in *Ireland* are affets in *England*: and so, it hath been resolved, that if the executor hath goods of the testator in any part of the world, he shall be charged in respect of them. *Cro. Ja. 55. 6 Co. 46.*

So an estate in the *plantations* is testamentary, and affets to pay debts. *2 Ventr. 358.*

Bonds and *specialties* are no affets, until the money is paid. *1 Ventr. 96.*

If an executor recover damages in trespass for goods taken away in the life of the testator; this (when recovered) shall be affets: because he recovers it as executor. *1 Roll's Abr. 920.*

If an executor recovers (as executor) things in *chancery* by equity; these things so recovered shall be affets. *1 Roll's Abr. 920.*

A debt due from an executor to a testator, is affets in equity to pay legacies. *3 Cha. Ca. 89.*

The interest which a master hath in a servant is not affets in the hands of an executor; for a servant whose master is dead, is legally discharged, and is not servant either to the heir or executor: but meet and honest it is, that one of them continue him in service, till a fit time of providing for him a new master; and fit for him, not to depart suddenly. *Went. 55.*

But the interest which one hath in an *apprentice*, is a chattel personal, and shall go to the executors. *Law of Test. 378, 379. Went. 55. 2 Bac. Abr. 416. 443.*

T. 17 C. 2. *Walker and Hall.* An action was brought against the executor, upon the covenant of the testator to teach an apprentice his trade; and after verdict for the plaintiff, it was moved in arrest of judgment, that this covenant was personal to the testator, and did not oblige the

the executors, but only obliged the master during his life to teach the apprentice. But by the court; It obliged the executors also, and they ought to see the apprentice taught his trade; and if they be not of the trade, they ought to assign him to another that is of the trade, so that he may be taught according to the covenant. And judgment was given for the plaintiff. 1 *Lev.* 177.

The interest in the liberty of a *prisoner* in execution for debt, is a chattel personal, and shall go to the executors. *Law of Test.* 378. 2 *Bac. Abr.* 416.

If an executor puts in suit a bond of 100 l for performance of covenants, and the parties submit to an *award*, and it is awarded that the obligor shall pay 70 l in full satisfaction, and that the executor shall release, which is done accordingly; it is said, that the executor shall be taken to have assets to the value of the whole 100 l: and tho' by the award he was compelled to release, it was his own act to submit to the arbitrament. 3 *Leon.* 53.

A *reversion* expectant upon an estate for life, is assets in the hands of the heir: but the creditor cannot compel the heir to sell it, but must wait till it falls. 1 *Abr. Eq. Caf.* 275.

In what case the lands and the personalty shall be charged in aid of each other.

9. If there be a debt due to the king, equity will order it to be paid out of the real estate, that the other creditors may have a satisfaction for their debts out of the personal estate. 1. *Ventr.* 455.

If one dies indebted by mortgage and simple contract, and one of the simple contract creditors gets judgment of assets when they shall happen, and the executor applieth the assets to pay off the mortgage; the simple contract creditors shall stand in the place of the mortgagee, as to what he hath exhausted out of the personal assets; and this being only by the aid of equity, all the simple contract creditors shall come in equally with the creditor that hath judgment. *Wilson and Fielding, M.* 1718. 2 *Vern.* 763.

So in the case of *Haselwood and Pope, T.* 1734; it was decreed, that if a man deviseth his lands to trustees to pay all his debts, and dies indebted by specialty and simple contract, and the bond creditors recover part of their debts out of the personal estate, and afterwards they apply to be paid the rest of their bond debts out of the real estate devised for that purpose; in this case, as the testator intended all his creditors should be equally paid their debts, the bond creditors shall not come in upon the land, until the simple contract creditors have received so much thereof, as to make them equal, and upon the level with the bond creditors, in respect of what they received out of the personal estate. It was also decreed, that where one gives a specific, or even a pecuniary legacy, and deviseth lands to pay his debts; if a simple contract creditor comes upon the personal estate, and exhausts it so far, as to break in upon the specific or pecuniary legacy, these legatees shall stand in the place of the creditors, to receive their satisfaction out of the fund raised

raised by the testator for the payment of their debts: But where a man dies indebted by bond, and leaves a personal estate, and deviseth lands to one in fee, and gives specific legacies, and the creditor by bond comes on the personal estate to be paid his bond; the specific legatees shall not stand in the place of the bond creditor, to charge the land devised, because the devisee of the land is as much a specific devisee, as the legatee of a specific legacy. And in this cause the lord chancellor said, that the personal estate is the natural fund for payment of debts, and which as against creditors, unless they please, the testator cannot exempt; but against the devisee of his land he may, by appropriating his land as a fund for payment of his debts; but even in that case, according to the general rule, there ought to be express words to exempt the personal estate from the debts, or at least very plainly shewing this to have been the intention of the testator. 3 *P. Will.* 322.

So where a man devised all his freehold houses lands and hereditaments to trustees, to hold to them in trust, that the freehold estate should be subject to, and be sold and disposed of by them, for payment of his just debts; and after disposing of some particular legacies, he gave to his nephew the rest and residue of his goods, chattels, debts, rights, credits, and personal estate not before disposed of. Hereupon the question was, whether the personal estate should be first applied to the payment of the debts, notwithstanding the real estate was expressly devised for that purpose. The counsel for the defendants (who were the trustees and residuary legatee) insisted, that the real estate being not only made subject, but directed to be sold for payment of the debts, the personal estate should not be applied for that purpose. But by the whole court of exchequer, Here being no negative words to exclude the personal estate from being applied for the payment of debts, that ought first to be applied for the benefit of the heir at law (who was the plaintiff); and decreed accordingly. *Bunb.* 302.

And by the lord chancellor Hardwicke, in the case of *Walker and Jackson*, Jul. 22. 1743; upon a rehearing at Lincoln's inn hall: The general rule is, that the personal estate shall be first charged with payment of debts and legacies, and the testator cannot exempt it from being liable to his debts, as against creditors; but as between heir and executor, he may charge them upon any other fund which is not primarily liable, and discharge the personal estate. There are several ways, by any of which a man may give his real estate for payment of his debts; as, first, to trustees; secondly, by way of charge in equity, which the court of chancery will decree to be performed; or, thirdly, he may direct that his real estate may be sold for payment of his debts: but let him do which way he pleases, none of those ways will make the real estate first chargeable, if there be not in the will, either express words, or a manifest intent to discharge the personal estate, but it shall be first liable. *Bunb.* 302.

10. In an action of debt against two executors, if they plead severally by several attorneys fully administered, and the jury find that the one hath

In what case both executors shall be

charged,
where one
only hath af-
sets.

hath assets, and that the other hath not any assets; the judgment shall be only against him who is found to have assets, and that the other who had not assets shall go quit. 1 *Roll's Abr.* 929.

But where two executors join in an acquittance, but one only receives the money; both are chargeable for it as to creditors, who are to have the utmost benefit of the law: but the actual receiver (it is said) is only chargeable as to legatees or persons claiming under distribution; for the substantial part is the actual receiving of the money, and this only is regarded in conscience. By Harcourt lord chancellor. *M. 12 An. Churchill and Hopson.* 1 *Salk.* 318.

What debts
to be first sa-
tisfied.

11. Generally, if the debts are *in equal degree*; the executor may give the preference unto which he will. 10 *Mod.* 496.

So that if all the goods are but 201, and debts are due to two by obligation, each of 201; the executor may pay which of them two he will. *Br. Executor.* 172.

But in this case the chancery will sometimes interpose; because this power may be an inlet to fraud. 10 *Mod.* 496.

In like manner, the executor may allow unto himself his own debt, in prejudice of other debts in equal degree; provided that he hath made an inventory, and provided he be not executor of his own wrong. *Swin.* 459. 2 *Bac. Abr.* 435.

And the court of chancery will not take from the executor himself, this preference which the law gives him. 10 *Mod.* 496.

But in both these cases, if the debt of the one be payable at a future day, and of the other presently; the executor cannot prefer such future debt, and pay it before the day of payment comes, and leave the other unpaid. But after the day happens, he may prefer either; unless in case of a suit commenced before the day. *Went.* 142.

But amongst executors themselves, or joint administrators; one executor or administrator may not prefer his own debt, before the debt of another executor or administrator, being in equal degree. Thus in the case of *Chapman and Turner*, in chancery, Feb. 26. 1738. Two bond creditors, *A* and *B*, took joint letters of administration. *A* got into his hands best part of the assets, and retained for his own debt against *B*. On a bill for an account, the question was, whether *A* by this had got such a legal advantage, as to be intitled to keep the assets, and so *B* lose his debt? By the master of the rolls: The rule of this court in cases of retainer is, Unless the party can shew a legal cause to retain, we never give it him; if he can shew a legal right, we never take it from him. The question then is, whether at law this be a good retainer? At law, no doubt, an executor or administrator hath a right, in case of debts in equal degree, to prefer one to another, and to retain for his own in the first place against any other creditor; and the reason is, because if a retainer were not allowed, an executor in case of a deficiency of assets would have no possible way of obtaining satisfaction for his debt; for at law there is no such thing as splitting of debt, or making a ratable proportion, and therefore he cannot come in upon an

an average with the rest of the creditors, nor has the advantage of another creditor, who by bringing his action in due time may recover his debt, tho' there be not enough assets at last to answer all demands upon the testator; for he cannot sue himself. So that this privilege of retainer is founded on the policy of the common law, that executors may not be deprived of one advantage without having another in lieu of it, and that they may not be in a worse condition than all mankind besides. But this is not a case between an executor or administrator, and a creditor; but between two joint administrators, who are both in the same condition in all respects. No authority hath been cited in this case, to support a retainer by one administrator against the other, nor do I see how there ever could be one; because an administrator can bring no sort of action against his companion, wherein this point might have been settled at law. Neither doth the reason of the law justify such a retainer: for administrators are considered but as one person in law; the possession of the one is the possession of the other; the receipt of one is the receipt of the other; and therefore the retainer of one must be considered as the retainer of the other; and must enure for their mutual benefit in the discharge of the debts of both in proportion. Then the consequence would be very bad, were a retainer allowable in this case; for administrators must fight for the assets, if getting the sole possession would intitle either to a separate right in them. So that, as no legal right of retainer has been shewn, the rule must take place, that he who cannot retain in law cannot in equity. The plaintiff is intitled to an equal distribution of the assets, being an equal creditor, according to conscience and equity; and the defendant must be decreed to account. *Viner. Executors. D. 2.*

Another difference, where debts are in equal degree, is said to be, that regularly that debt shall be paid first for which suit is commenced, and not that for which no suit is commenced; for after a suit begun, the executor (it hath been holden) may not excuse himself by any voluntary payments. *2 Cha. Ca. 201. 2 Vern. 62.*

Yet it is said, that the executor, before notice of such suit, may pay any other creditor in equal degree; and then plead, that he hath fully administered before notice. *Br. Executors. 43. Went. 146.*

And in the case of *Mason and Williams*, it was held by Cowper lord chancellor, that pending a bill in equity against an executor, or after a decree *quod computet*, an executor may pay any other debt of a higher nature, or as high a nature, if there be *legal* assets; but if he hath only *equitable* assets, then the court of chancery will not indemnify him, and suffer him to prejudice and disappoint the first suitor. *2 Salk. 507.*

If there be two creditors in equal degree, and both sue; if the executor doth by covin help that creditor which began his suit last to his judgment or execution first, and there be no assets left to pay the other creditor, he must be satisfied out of the executor's own estate, if this covin be proved against him. But the confession of an action by the executor, where there is a real debt, is no covin: and such recovery by

confession is a good plea for the executor against another creditor. *Swin. a. 459.*

In the case of *Joseph and Mott, M. 1697.* A man made his will, and died indebted to several persons by bond, more than his personal estate would pay. A bond creditor brought a bill against the executor, to have a discovery and account of the personal estate, and a satisfaction of his debt. At the hearing, the executor made default; so there was a decree against him for an account and satisfaction out of the assets, unless cause shewed. Before the decree was made absolute, another bond creditor of the testator brought an action at law against the executor, upon a bond. He appeared, and because he could not plead this decree at law, suffered judgment to go against him by default. And the account being carried on before the master, it was doubted whether he should allow this judgment on the account. The master of the rolls was of opinion, that the decree must be preferred. And it coming to be reheard before the lord chancellor, he was of the same opinion. *Prec. Cha. 79.*

But in the case of *Darston and the earl of Orford, H. 1701.* After a bill filed in chancery, against an executor for a discovery of assets, and answer put in, the executor voluntarily paid a bond debt without suit. The cause proceeded to a hearing, and an account was decreed. And the question was, whether this voluntary payment, pending a suit here, should be allowed on the account. And the lord keeper Wright thought the payment ought to be allowed; but this being a point of consequence, he ordered precedents to be searched. Afterwards, 3 June, 1702, on precedents produced on both sides, his lordship seemed to be of the same opinion, but said the case of *Joseph and Mott* was a precedent against him, but thought that to be a direct change of the law. The next day (upon consideration of the precedents) his lordship said he was bound up by them, and therefore decreed the payment (being voluntary) to be disallowed; but seemed to disapprove of the case of *Joseph and Mott*, where the judgment at law was fairly obtained. Afterwards, 21 Nov. 1702, this decree was reversed in the house of lords, and the payment allowed. *Prec. Cha. 188. 3 P. Will. 401.*

So in the case of *Waring and Danvers, M. 1715.* The plaintiff, a simple contract creditor of the testator, brings an action on a special original against the executor, in order to recover his debt. The other simple contract creditors offered the plaintiff to come in for his proportion of his debt with them; but having first filed his original, he insisted on his whole debt, in preference to the rest. Upon which, the executor and the other simple contract creditors entered into articles, agreeing, that first the executor should be paid his debts, and then that all the simple contract creditors should equally share the assets amongst them, exclusive of the plaintiff. And in order to bar the plaintiff at law, the executor gave judgment in the several *quantum meruit*s brought by the other simple contract creditors, for the several sums which were laid as damages in the declarations, without ascertaining the damages by

by writ of inquiry, but those damages were so laid as not to exceed the real debt. Upon this, the plaintiff brought his bill. But the master of the rolls dismissed the bill, without costs, it being a hard case; but afterwards, on consideration, he gave costs. And the decree was affirmed by the lord chancellor. The master of the rolls said, if the plaintiff desired it, he would send it to the master to see whether the judgments confessed to the other creditors be more than their real debts; but the plaintiff not thinking it worth his while, the court decreed as above. 1 P. Will. 295.

In the case of *Barker and Dumeres*, Jan. 29. 1740. *Robert Dumeres* died intestate, and on his death *Edward Dumeres*, who was a relation of his, applied for administration. *Barker*, who was a creditor of *Robert* by bond, opposed the granting of the administration to *Edward*, by reason of his insufficiency, and his intention of going over to Jersey. However, administration was granted to him. This administration was in some measure granted to *Edward* by the leave of this court. *Barker* had entred a caveat against its being granted to him, tho' that caveat was afterwards withdrawn. But as there were these objections against him, *Barker* filed his bill against him the 31st of October last, for the payment of his debt; and prayed that he might give security to abide that determination. His answer came on the 27th of the next month; and an order was made that he should find such security, which he accordingly did. After this, *Merry*, who was another bond-creditor to the intestate, brought his action of law against *Edward*, and *Edward* confessed a judgment to him in michaelmas term in that same year in 4000l. This occasioned *Barker's* bringing his action at law against *Edward*, upon the same bond for which the bill was brought here; in order that *Edward* might not confess judgments to other persons, before he could get judgment against him. As soon as this action was brought, a motion was made on the part of *Edward*, praying that *Barker* might make his election, which court he would proceed in, whether at law or in equity. — By the lord chancellor *Hardwicke*: It is very true, that it is the general rule of this court, that a person shall not be allowed to proceed both at law and in equity, for one and the same demand, at one and the same time. But notwithstanding that, it is as certain, that by the ancient course of the court, a person was allowed to bring his action at law against the representative of the deceased, and at the same time to bring his bill here in order to have a discovery of assets; tho' now it is established, that if the party proceeds in equity against such representative, his bill must be both for a discovery of assets, and a satisfaction for his debt; and he shall not be allowed to proceed both at law and in equity. And where the party has proceeded in both courts, several orders have been, requiring him to make his election. But where the court sees that the representative is confessing judgments, that is a reason (and in my judgment shall always be a reason) that the court will not require the party to make his election. The courts of law distinguish the case of executors, in instances similar to this, from other

other cases. Therefore tho' the constant course of those courts is, on reasonable circumstances, to give a defendant farther time to plead, than he is obliged to plead in by the strict rule of the court; yet when an executor applies for this favour, the time for pleading shall not be enlarged, but by his consenting not to confess judgments in the mean time. 'Tis indeed true, that an executor in some instances may honestly confess judgments to other creditors; as where he does it to prevent his being doubly charged, or the like: but when this court sees, that he doth this in order to elude its orders, the court will never permit it. Now what is the nature of the present case? The original bill was filed the 31st of October last. The answer of Edward came in on the 27th of November following. And in the beginning of michaelmas term here is a judgment confessed by Edward to Merry, in 4000*l*. The administration it self was in some measure granted to Edward by the leave of this court. Barker had entred a caveat against its being granted to him, tho' that caveat was afterwards withdrawn. The proper order for the court to make in this case is, that Barker make a special election, namely, to proceed at law to recover judgment there, and to proceed in this court for a discovery, and an account of assets, but that he shall not be at liberty to take out execution upon the judgment without leave of this court. And it was ordered accordingly. *Barn. Cha. Ca.* 277.

Forfeiture for
not burying
in woollen.

12. By the statute of the 30 C. 2. c. 3. The forfeiture for not burying in woollen *shall be paid out of the estate of the person deceased; before any statute, judgment, debt, legacy, or any other duty whatsoever.* *f.* 4.

Funeral ex-
pences.

13. Next the funeral expences shall be paid.

But in *Shelley's* case, *T. 5 W.* it is said, that in strictness, no funeral expences are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers fees; but not for pall or ornaments. *1 Salk.* 196. [Perhaps the expences of the shroud, and digging the grave ought also to have been added.]

Overseer of
the poor dy-
ing.

14. By the statute of the 17 G. 2. c. 38. *If any overseer of the poor shall die, his executors or administrators shall within forty days after his decease, pay out of the assets all money remaining due, which he received by virtue of his office, before any of his other debts are paid.* *f.* 3.

Charges of
probate or ad-
ministration.

15. Next to these, as it seemeth, come the charges of the probate of the will, or of the letters of administration.

Debts due to
the king on
record.

16. Next, debts due by the testator to the king are to be discharged; and it is not in the choice of the executor, to prefer any other debt due to any subject. *Swin.* 455.

Which must be understood of such debts as are due to the king only by matter of record, and not of sums of money due to the king upon wood-sales, or sales of his minerals, for which no obligation is given; or of amercements in his courts baron or courts of his honours, which be not courts of record; or of fines for copyhold estates there; or of forfeitures to the crown of debts by contract due to any subject by out-lawry

lawry or attainder, until office thereupon found. *Swin. a. 455, 456.*

2 Bac. Abr. 432.

17. By the statute of the 9 An. c. 10. *Debts due to the post office for letters, shall be preferable in payment before any debt due to any private person.* *Debts due to post office.*

son. f. 30.

18. Next, debts due to private persons upon judgments against the deceased in his life; and after those, debts upon judgments (altho' by mere confession, and without defence) against the executor or administrator for the debts of the deceased. *Law of Ex. 39. Treatise of Eq. 112.*

But it is said, that the executor is not bound to take notice of judgments against the testator in his life, without being made acquainted therewith by the creditors; for the executor is no way privy to his acts.

1 And. 159.

And if the judgment is satisfied and is only kept on foot to wrong other creditors, or if there be any defeasance of the judgment yet in force; then the judgment will not avail to keep off other creditors from their debts. *Swin. a. 456. 2 Bac. Abr. 433.*

And of two judgments, he who first sues execution must be preferred; but before, it is at the election of the executor to pay which he will first: Only, a judgment in a foreign country, as *France*, is to be considered but as a simple contract. *Treat. of Eq. 112. Swin. a. 436.*

And it is not necessary, that the judgment be limited to the courts at Westminster; but if it be obtained in any court of record, which hath power to hold plea by charter or prescription of debt above 40s, it is sufficient. For tho' upon such a judgment execution cannot there be had, but of such goods as are within the jurisdiction of that court; yet if the record be removed into chancery by a certiorari, and there by mittimus into one of the benches, then execution may be had upon any goods in any county of *England*. *Swin. a. 456.*

But a judgment not *doggeted*, as by the 4 & 5 W. c. 20. *shall not affect any lands as to purchasers or mortgagees; or have any preference against heirs, executors, or administrators, in the administration of the estates of their ancestors, testators, or intestates.*

Which act, in order to render more easy the finding of such judgments entred, directs in what manner alphabetical lists shall be made of judgments by confession, *non sum informatus*, or *nihil dicit*, in any of the courts of record at Westminster; to which any person may resort, on paying 4d and no more.

19. In the case of *Harding and Edge*, H. 1682. In the chancery. Decree in. Upon a special report, the sole question was, how a duty decreed should equity. take place in relation to other debts in point of priority of satisfaction; and ordered, that a decree should preceed debts on simple contracts and bonds, and take place next to judgments. *1 Vern. 143.*

But in the case of *Peploe and Swinburn*, M. 1719. In the exchequer. It was decreed, that creditors by judgment at law, and creditors by decree in equity, shall be paid equally without any preference. *Bunb. 48.*

And

And it is now become the established doctrine, that a decree of the court of chancery, is equal to a judgment in a court of law. So where an executrix, whose testator was greatly indebted to divers persons in debts of different natures, being sued in chancery by some of them, appeared and answered immediately, admitting their demands (some of the plaintiffs being her own daughters); and other of the creditors sued the executrix at law, where the decree not being pleadable, they obtained judgments; yet the decree of the court of chancery, being for a just debt, and having a real priority in point of time, not by fiction and relation to the first day of the term, was preferred in the order of payment to the judgments, and the executrix protected and indemnified in paying a due obedience to such decree, and all proceedings against her at law stayed by injunction. Case of *Morris* against the *Bank of England*. Decreed first at the rolls by Sir Joseph Jekyll, in Aug. 1735. Which was affirmed by the lord Talbot in Nov. 1736. And his lordship's decree affirmed in parliament in May, 1737. 3 *P. Will.* 402. *Cas. Tabl.* 217.

Recognizances and statutes.

20. Next, debts upon recognizances at common law. *Law of Ex.* 39.

And debts upon statutes merchant or staple, or recognizances in nature of a statute staple. *Law of Ex.* 39.

And these recognizances and statutes standing in equal degree; it is at the executor's election, to give precedency to which he will. *Swin. a.* 457. 2 *Bac. Abr.* 434.

Neither between one statute and another, doth the time or antiquity give any advantage as touching the goods, tho' touching the lands of the conusor it doth. But as for the goods in the hands of the executor, he who first seisseth them by execution is preferred; and before suing of execution, the executor may give precedency to which he will. *Swin. a.* 457.

But amongst statutes and recognizances, those which are forfeited, shall be preferred before those which are for the performance of covenants, not broken. *Swin. a.* 457.

And these, before they are broken, do not take place of specialties. *Treat. of Eq.* 112.

Mortgages.

21. In the case of the earl of *Bristol* and *Hungerford*, *M.* 1705. It was first decreed at the rolls, that mortgages were to be paid in the first place, and then judgments, and then recognizances: But upon an appeal to the house of lords, it was adjudged, that mortgages are not to be preferred to other real incumbrances; but that mortgages, statutes, and recognizances shall take place according to their priority, and as they stand in order of time. 2 *Vern.* 524.

Rent, bonds, and other obligations.

22. Next, debts by specialty, as those by bonds or other obligations, sealed by the testator. 2 *Bac. Abr.* 434.

Also rent arrear, and unpaid by the testator, is equal to a debt by specialty; for this favouring of the realty, the executor can no more wage his law against such a debt, than he can to a debt by specialty. 2 *Bac. Abr.* 434.

So where debt was brought against an executor for rent reserved on a parol lease, after the lease was determined, and the executor pleaded that the testator entred into an obligation, and that he had not affets above 5l, which were not sufficient to discharge this obligation; on demurrer it was resolved, that this rent, tho' reserved on a parol lease, was yet equal to an obligation, and that it still remained in the realty, tho' the term was determined. 2 *Bac. Abr.* 434.

Also by the custom of London, if a citizen of London dies indebted by *simple contract*, such debt is equal to a debt by specialty. 2 *Bac. Abr.* 434.

E. 1715. *Parker and Harvey*. The grantor's *covenant* in a marriage settlement for him and his heirs, that the premisses were free from incumbrances, shall come in equally with creditors on bond. *Vin. Executors.* Q. a. 39.

If two men are *partners* in trade, and one of them gives a bond to leave his wife 1000 l, and dies; and the other partner administers: If the wife would be paid out of the separate estate of her husband, on there being effects, she shall have a preference before other creditors: But if there is no separate estate, and the wife would have satisfaction out of the partnership effects, then all the partnership debts must be first paid. 3 *P. Will.* 182.

Any *voluntary* bond is good against an executor or administrator, unless some creditor be thereby deprived of his debt: Indeed, if the bond be merely voluntary, a real debt (tho' by *simple contract* only) shall have the preference. But if there be no debt at all, then a bond, however voluntary, must be paid by an executor. 3 *P. Will.* 222. *Comyns.* 255.

A man, having a wife who lived separate from him, afterwards married another woman who knew nothing of the former wife's being alive; but it being discovered to the second wife that the former was alive, the husband (in order to prevail with the second wife to stay with him) some years afterwards gave a bond to a trustee of the second wife, to leave her 1000 l at his death, and died not leaving affets to pay his *simple contract* debts: If this bond had been given immediately on the discovery, and they had parted thereupon, it had been good; but being given in trust for the second wife, after such time as she knew the first was living, and to induce her to continue with the husband, this was worse than a voluntary bond, and decreed to be postponed to all the *simple contract* debts. But if such bond had been given to the second wife as a recompence for the injury done her, and thereupon she had left the husband, it had been a good bond, and to be paid before any *simple contract* debts. 3 *P. Will.* 339, 349.

If there be *divers* obligations of the like kind, it seemeth to be in the power of the executor to discharge which obligation, and to gratify which of the creditors he will: which being done, the other creditors are without remedy, if there be no affets; unless the day of payment in the one obligation (as was observed before) be expired, and the day of

payment of the other obligation is not yet come; in which case, the former obligation is to be first satisfied; or unless there be suit commenced for some obligation, for then it is not in the power of the executor to discharge another obligation for which no action is brought, in prejudice of the former suit. But an executor may confess judgment on one obligation, and plead that judgment to an action brought on another obligation. And if there be two obligations, and the two several creditors bring several actions against the executor, he that first obtaineth judgment must be first satisfied. *Swin. 457, 458. 2 Bac. Abr. 434, 5.*

Altho' the executors are not named in an obligation, yet the law will charge them, for that they represent the estate of the testator. And the law is the same of administrators. But the heir shall not at any time be charged, without express mention of the heir. *Dyer 23.*

Simple contract.

23. Debts by simple contract are postponed to all others, being debts of an inferior nature; yet an executor is bound, as far as he hath assets, to pay them, as much as any other debt; and therefore a simple contract creditor need not alledge, that the executor had assets to satisfy debts of a superior nature, and his also; but if the truth be, that the executor hath only assets sufficient to satisfy such superior debts, he must plead it. *2 Bac. Abr. 434.*

But by the 29 C. 2. c. 3. *No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. s. 4.*

But albeit the law requires, that debts should be paid according to their superiority, as herein set forth; yet may an executor pay a debt on a simple contract before a specialty, if he hath no notice of such specialty: for otherwise it might be in the power of the obligee to ruin the executor, by keeping his bond in his pocket until the executor shall have paid away all the assets in discharging simple contract debts. *2 Bac. Abr. 434, 5.*

But of debts upon record, the executor ought to take notice at his peril. *2 Bac. Abr. 435.*

And in the case of *Greenwood and Brudnish, T. 1720.* A man mortgaged his lands, and gave a bond to perform covenants, and after died intestate. His widow, *without* taking letters of administration, possessed her self of his personal estate, and paid it all away in satisfying debts on simple contract. About seven years after, an old dormant intail was discovered, and the heir in tail brought an ejectment, and recovered possession. Whereupon the mortgagee sued the widow upon the bond. She brought a bill for an injunction, having paid away all the testator's assets before any notice of this bond, and therefore alledged that she ought not to be chargeable with a devastavit. The defendant demurred, and the demurrer was clearly allowed, the bill being an attempt to alter the course of law. But if any extraordinary fraud had been charged on

on the defendant, by which she had been deceived, or induced to pay away the assets, that might have varied the case. *Prec. Cha.* 534.

24. A person indebted by bond and simple contract, deviseth lands to trustees to be sold for payment of his debts: It was resolved and declared to be the constant rule, that the creditors should have in proportion, and not the bonds to be first satisfied; for it shall be construed, that (one of them being as much a debt as the other) the testator intended they should all be paid alike; and if the value of the land fall short, they shall be satisfied in proportion: So legatees shall have equal proportion pro rata, according to the greatness or smallness of the legacy; for the land is made debtor: But otherwise it is of judgments; for these do affect the land by their own strength and nature, and would have had the preference whether such devise had been made or not. 2 *Freem.* 49.

In what case debts shall be paid *pari passu*.

175.

But if a man only charge his lands with the payment of debts, so that the lands descend subject to them; bonds shall be preferred to simple contract debts. 1 *P. Will.* 430.

A man deviseth lands to two persons in trust, to be sold for payment of his debts, and maketh the same persons executors. The question was, whether bond debts should have a preference, or all debts be paid *pari passu*? The difference was taken, when the same persons that are trustees to sell the lands are executors likewise, and where not; for in the former case, after the land is sold, it is assets even at law; and therefore to decree them to pay otherwise than according to the legal course, would be to decree a devastavit. And in this case it was decreed, that bond debts must be preferred. *Prec. Cha.* 127.

A lease for years, or a bond or grant of an annuity taken in a trustee's name, being personal assets, shall be applied in a course of administration, and not for the payment of all the debts equally. 2 *Vern.* 764.

If a man possessed of a term for years, mortgage it and dies, leaving debts some by bond, and some by simple contract; the equity of redemption is equitable assets, and shall be liable to all the debts equally. 3 *P. Will.* 341.

And the distinction seemeth to be this: Where there are legal assets, that is, assets which are liable at law without the help of equity, there the executor may apply them according to the course of law, which allows and requires a preference to be made in certain cases as hath been mentioned; but where there are only equitable assets, that is, assets which are not liable without the help of a court of equity, in such case the court will direct the application thereof according to that course which is most equitable and just, namely, to pay every creditor his share in proportion.

So where the assets are partly legal, and partly equitable; altho' equity cannot take away the legal preference on legal assets, yet where one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the court will postpone him till there is an equality, in satisfaction to all the other creditors out of the

equi-

In what cases
interest shall
be allowed.

equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets. *Cha. Ca. Talb.* 220. 2 *Vern.* 435.

25. As debts upon judgments, recognizances, mortgages, bonds, and other like specialties, shall carry interest; so also interest hath been allowed upon demands due by *covenant*, altho' it was objected that they were not liquidated, and only found in damages. *Viner.* Interest. C.

Where a man prays satisfaction for a *simple contract* debt, merely out of *personal* assets; a court of equity will of course direct the debt to be paid with interest, to be computed from one year after the testator's death. *Barnard.* 229.

But where a *real* estate is charged with the payment of debts, as well as the personal; the lord chancellor Hardwicke said he did not know, that it was absolutely fixed, that simple contract debts should carry interest from that time; and he believed, if the decrees of the court were looked into, it would be found, that a great many of them are in this form, that the master should take an account of the value of the estate and of the debts, that he should compute interest upon such of the debts as carry interest, without giving any direction, that interest should be computed upon the other debts. *Id.*

Where a man *devises his lands for the payment of his debts*; it is said, that this devise makes the land as a security or mortgage for all the testator's debts, as well those by simple contract as otherwise; and the simple contract debts shall carry interest, as the land, which is the fund, yields annual profits: By lord chancellor Macclesfield, who said that this was the daily practice. 2 *P. Will.* 26.

But where a real estate is *charged* only with the payment of debts; the lord chancellor Hardwicke seemed to think, that this will not make the simple contract debts to carry interest. And he said, that on a general devise of lands for the payment of debts, he should think that simple contract debts ought not to carry interest. *Barnard.* 230.

The arrears of an *annuity* or rent charge are never decreed to be paid with interest where the sum is uncertain, but only where it is certain and fixed. *Cas. Talb.* 2.

In the case of *Litton and Litton*, T. 1719. Interest of an annuity was decreed by the lord chancellor from the very day it became due. But Mr Peere Williams adds a query as to this, and says, it seems the arrears should carry interest only from the first day of payment next after the arrears of the annuity became due; if payable half yearly, then from the next half year day; if quarterly, then from the next quarter day; and so has been the common rule in these cases. 1 *P. Will.* 541.

Debt barred
by the statute
of limitation.

26. T. 1707. *Staggers and Welby*. At the lord chancellor's house. It was held by Cowper lord chancellor, that if one by will subject his lands to the payment of his debts, debts barred by the statute of limitation shall be paid; for they are debts in equity, and the duty remains; the statute hath not extinguished it, tho' it hath taken away the remedy. 1 *Salk.* 154. 2 *Vern.* 374.

7. 1726. *Blakeway* and the earl of *Strafford*. In 1707, Sir Henry Johnson was indebted to *Blakeway* in 343l. In 1714 he received 50l in part. In 1719 Sir Henry died, having made his will, and devised his lands to his executors, in trust to pay his debts. The executors renouncing, the earl of *Strafford* administered with the will annexed. *Blakeway* brought his bill to be paid out of the assets. The earl of *Strafford* pleaded the statute of limitations; and that neither he, nor (as he believed) Sir Henry, made any promise to pay the debt, within six years before the bill brought. Lord chancellor: I would be cautious of giving any relief against an act of parliament; but it is plain, the debt is not extinguished by the statute of limitations, since the statute must be pleaded, which the defendant is not bound to do; and if he afterwards will acknowledge the debt, it takes it out of the statute: and his lordship over-ruled the plea. Upon appeal brought in the house of lords, this decree was reversed, and the plea ordered to stand for an answer.

2 *P. Will.* 373.

But if the debtor by his will directs that *all his debts* shall be paid, or makes any provision for the payment of his debts in general; this will revive it, and bring it out of the statute, and make his executors liable. *Prec. Cha.* 385.

So if the debtor, upon application for that particular debt, acknowledges and promises payment (for a bare acknowledgment is not sufficient); this will bring it out of the statute: for the acknowledgment and promise is a new evidence of the debt. *Id.*

27. Where a testator is much indebted, and the executor is desirous to be rid of the assets; the executor's safest way is, to file a bill in chancery against the creditors, to the end they may, if they will, contest each others debts, and dispute who ought to be preferred in payment. 2 *Vern.* 37.

Executor may file a bill, to determine priority of payment.

28. In debt against an executor, if the defendant plead fully administered, if any assets be found in his hands, altho' there be not to the value of the debt; yet the plaintiff shall have judgment for his whole debt of the goods of the testator. 1 *Roll's Abr.* 929.

Plea of plene administravit.

But if it be found, that he had nothing in his hands; the judgment shall be, that the plaintiff shall take nothing by the writ, and shall not have judgment of the debt: for he hath waived this advantage by taking of the issue, and judgment is to be given upon the verdict. 1 *Roll's Abr.* 929.

29. If an executor plead *ne-unique executor*, and is found executor; the judgment shall be general, to recover the debt, for his false plea. 1 *Roll's Abr.* 930.

Plea of ne-unique executor.

In an action of debt against an executor, who pleadeth that he is not executor nor ever administered as executor, and this is found against him; the judgment shall be of the goods of the testator, if there are any such; if not, of his own goods; as well for the debt, as for the damages and costs. 1 *Roll's Abr.* 930.

30. An executor shall not be forced to pay legacies, until the legatees shall give bond to refund in proportion, or in the whole, for the debts to be paid before legacies.

satisf-

satisfaction of debts, if any shall appear unsatisfied. *Cha. Ca. Finch.* 136. *Viner. Devise. Q. d. 7.*

For debts are to be paid before legacies: and if the spiritual court will compel an executor to pay a legacy before he pay the testator's debts; a prohibition will lie. *Law of Ex.* 182.

But where lands are devised for payment of debts and legacies, and the debts are such as land is not liable to satisfy, as debts by simple contract; there, it is said, the debts shall have no preference of the legacies: but, if there be not sufficient to pay all, they shall be paid in proportion. *2 Freem.* 270.

So if a man bind himself in an obligation to perform a certain thing, and deviseth divers legacies, and dieth, leaving only sufficient to satisfy the obligation if this shall come to be forfeited; yet this obligation shall not be any bar of the legacies, because it is uncertain whether the obligation will ever come to be forfeited: But the executor shall make a conditional delivery of the legacy, to wit, that if the obligation shall be recovered against him, the legatee shall redeliver the legacy. *1 Roll's Abr.* 928.

VII. Of the payment of legacies, and distribution of intestates effects.

And,

I. Concerning the payment of legacies.

II. Concerning the distribution of intestates effects.

I. Concerning the payment of legacies.

1. **B**Y the statutes of the 25 C. 2. c. 2. and the 1 G. 2. c. 13. What persons persons required to take the oaths and otherwise qualify themselves are incapable for offices, who shall act without such qualification, shall be incapable of any legacy. of a legacy.

By the 9 & 10 W. c. 32. Persons denying the trinity, or asserting that there are more gods than one, or denying the christian religion to be true, or the holy scriptures to be of divine authority, shall for the second offence be incapable of any legacy.

And by the 5 G. c. 27. Artificers going out of the kingdom, and exercising their trades in foreign parts, shall be incapable of any legacy.

2. A legacy is extinct, by taking a *bond* for it. *Yelv.* 39.

In what cases legacies are taken away or extinguished.

Where the *statute of limitation* was pleaded in bar to legacy demanded, due twenty years before; it was held by the lord chancellor, that a legacy is not barred by the statute, nor ever had been so held. *2 Freem.* 22.

The father by his will gave to his daughter 1000l, to be first paid after his debts, besides a share out of the dividend of his estate. Afterwards, on her marriage, an *agreement* was made, for what she should have out of her father's estate, and that it should be only 1100l, and that was to be in full of what was intended her thereout. It was decreed by the master of the rolls, and confirmed by the lord chancellor, that this was an ademption of the legacy, and that the 1100l was to be in full of what the daughter was to have out of the said estate. *Hale and Aston.* 21 C. 2. 2 Cha. Ca. 35.

A man seised in fee, devised to his children 1000l, payable at several times, by 50l a year, with which sums he charged his lands, and then died. One payment of 50l became due; then the lands were aliened by *fine* and proclamations, and five years passed. The devisee sued for the whole. But it was decreed, that what became due after the *fine*, was barred by the *fine*; but not the 50l due before: For a trust is barred by *fine*. *H. 30 & 31 C. 2. Wakelin and Warner.* 2 Cha. Ca. 247.

Legacy given out of a *term for years*; if the term determines, the legacy is extinct. *Cha. Ca. Finch.* 464.

A legacy was devised out of *debts* due in several counties, and they were all called in before the testator's death; yet the legacy remained good. And a difference was taken between a pecuniary and a specific legacy; for

in the first case the legacy will remain, though the debt upon which it is charged be paid in : but the specific legacy may be lost by being altered. So where the legacy was greater than the debt out of which it was directed to be paid did amount unto ; yet such sum being expressly devised, and there being assets, it was decreed to be paid. *Chs. Ca. Finch. 152. Raym. 335.*

T. 1728. Ford and Fleming. One by will devised thus : I give to my granddaughter Mary Ford (the plaintiff) the sum of 40 l, being part of a debt due and owing to me for rent from G. M. she allowing what charges shall be expended in getting the same : Also, I give unto my two grandsons the rest and residue of what is owing to me from the said G. M. which is about 40 l more, to be equally divided between them, they allowing charges as aforesaid. Afterwards, the testator received the whole debt owing for rent from G. M. For the plaintiff it was insisted, that there was a difference between a specific and a pecuniary legacy ; that tho' the disposing of a specific might be an ademption of it, yet this being a pecuniary legacy, the paying the money to the testator would be a loss of it. On the other side, it was insisted, that there is a difference between a voluntary and a compulsory payment ; that tho' the first was no ademption, yet the second was, and that the testator compelled G. M. to pay in the money. But the lord chancellor was of opinion, that there was no foundation for the difference taken in the books between a voluntary and compulsory payment ; for the latter might be, with an intent to secure the legacy at all events ; and decreed to the plaintiff the 40 l legacy. *1 Abr. Cas. Eq. 302.*

So in the case of *Astton and Astton, M. 1735.* where the testator deviseth a debt, and afterwards receives it, or otherwise calls it in : In neither of these cases is this an ademption of the legacy ; seeing this might be done from an apprehension of such debt being in danger, and with a design to secure it ; and being personal estate, and not diminished by remaining in the testator's coffer instead of the hands of the debtor, it may well pass by the will. *3 P. Will. 386.*

M. 1736. Partridge and Partridge. The testator devised to the legatee 1000 l capital South sea stock. At the time of making his will he had 1800 l of such stock ; and after by sale reduced it to 200 l ; which he after increased to 1600 l, and died. Between the making his will and his death, the act took place, which changed three fourths of the capital South sea stock into annuities. This legacy is not taken away or impaired, by the sale, or by the act of parliament. *Cas. Talb. 226.*

Legacy where to be sued for. 3. The legatary or devisee may not of his own head take the goods or chattels devised to him, out of the possession of the executor, because the law gives him a remedy for the same, and because the law doth not appoint that the legacies shall be paid until the debts of the testator be first satisfied. *Swin. 19. 2 Bac. Abr. 435.*

For if the executor do detain the legacy, or do slack the performance of the testator's will ; the legatary must sue the executor in the ecclesiastical court, for the same legacy so detained or not satisfied. *Swin. 18.*

For where a devise is made of goods, if the executor will not deliver them to the devisee, he hath no remedy by the common law. *Terms of the L. Devise.*

For an action on the case lieth not against an executor for a legacy; unless he promise to pay it upon good consideration; for legacies are only to be recovered in the spiritual court, or in the courts of equity. *1 Sid. 46. Vin. Actions. O. c. 7.*

And in case of suit in the spiritual court, it behoveth the devisee to have a citation against the executor of the testament to appear before the ordinary, to shew why he performs not the will of the testator. *Terms of the L. Devise.*

And although certain goods in specie are given to a man by will; yet he cannot take them without the executor's assent; so if a term for years be so given to him, he cannot enter into the land without such assent: for it may be, the executor hath not assets besides, to pay the testator's debts. *Law of Ex. 262.*

Yea if a man do bequeath goods to another, which are in the custody of that other person; yet if he detain them from the executor (who hath not assented to the legacy), the executor may have an action of detinue or trespass, or of trover after demand of the goods, against the said legatee. *Law of Ex. 263.*

But in case of a devise of *lands*, the devisee may enter without the assent of the executor; and if the heir at law should enter before him, the devisee may enter and eject him. *1 Inst. 111.*

For seeing that an inheritance devised is not demandable in the ecclesiastical court, but in the temporal; therefore the legatary, according to the devise, without farther assignment or delivery, may enter into the same after the death of the testator. *Swin. 19.*

But if *chattels real*, as a lease, be bequeathed by will; a man may sue for the same in the court ecclesiastical. *Swin. 19.*

If a legacy be granted *out of lands* in fee simple; this shall not be sued for in the spiritual court: But if land be devised to be *sold for payment of legacies*; the land being sold, the suit for the money to be distributed may be in the spiritual court; for the money is personal, and assets in the hands of the executors, so as it favours not of the realty being executed. *Cro. Car. 396, 397. Brownl. 32.*

But where a man deviseth that his executors shall sell his lands, and out of the money which shall be raised by sale, giveth a *portion to his daughters*; it hath been adjudged, that neither the land nor money is testamentary, for it is not assets to satisfy debts, but a sum arising of land, and appointed to special uses in way of equity, and not as a legacy, and therefore not to be sued for in the ecclesiastical court, but in a court of equity: and the ecclesiastical court cannot hold plea of a legacy in equity, but where it is a legacy in law indeed. *Cro. Car. 395, 396. Swin. a. 19.*

So if a man devise lands to be sold for the payment of debts, and dispose of the *surplus* to several persons; that cannot be sued for in an ecclesiastical court, but only in a court of equity: because that is not a legacy merely of goods and chattels, but it ariseth originally out of lands and tene-

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ments; and they have a testamentary jurisdiction touching chattels only. *Str.* 672.

So where the testator devised a legacy to one, to be paid out of the profits of his land, and he devised those very lands to his executor for a term of years, and died; adjudged, that this was a temporal matter, and not testamentary, because the legacy was to arise out of the profits of the lands. *Swin.* 20.

But where the testator devised *leases* to his eldest son, and that out of the same he should raise such a sum of money for portions for his daughters, who libelled in the spiritual court for their portions; it was adjudged, that this should not be accounted as a rent issuing out of the lands, but as a testamentary legacy, and to be recovered in that court. *1 Bulst.* 153.

M. 2 An. Exer and Jones. It was held by Holt chief justice, clearly, that a devisee may maintain an action at *common law*, against a tertenant for a legacy devised out of land; for where a statute, as the statute of wills, gives a right; the party by consequence shall have an action at law to recover that right. *2 Salk.* 415.

But the usual remedy in such like cases, is in equity. *3 Salk.* 223.

It is said, that where the ecclesiastical court and a court of equity have a concurrent jurisdiction, which ever is first possessed of the cause, has a right to proceed: and the same of all other courts. But where the husband hath sued in the spiritual court for a legacy given to the wife, the court of chancery hath granted an injunction to stay proceedings; because the spiritual court cannot oblige him to make an adequate settlement on her. *Prec. Cha.* 546.

So where a personal legacy was given to an infant; it was held, that the same is more properly cognizable in chancery than in the ecclesiastical court; and if the matter had proceeded to sentence in the ecclesiastical court, yet it was proper to come into chancery for the executor's indemnity; for in the chancery legatees are to give security for the money, but not in the spiritual court; and the chancery will see the money put out for the children. *1 Vern.* 26.

Legacies may be recovered in the spiritual court against an *administrator with the will annexed*, or against an *executor of his own wrong*. *1 Roll's Abr.* 919.

Where the executor, being sued in the spiritual court for a legacy, pleads the legatee's release, and that court tries the validity of that release, the common law will not prohibit them, provided they try it by the rules of the common law; because they have jurisdiction of the legacy, which is the original cause. *2 Roll's Abr.* 307.

But where *plene administravit* was pleaded in the spiritual court, and proved by one witness, which they would not allow; a prohibition was granted. *Het.* 87.

So where an executor, being sued for a legacy in the spiritual court, pleaded the plaintiff's release, which was disallowed there, because the witnesses were dead, and that court refused to allow circumstantial proofs of the release; a prohibition was granted. *2 Roll's Abr.* 302.

4. An executor may in some cases be compelled to give security to pay a legacy; as where 1000*l* was devised to a person to be paid at the age of twenty one years; and upon a bill exhibited against the executor, suggesting a devastavit, and praying that he might give security to pay the legacy when due, it was decreed accordingly. *1 Cha. Ca. 121.* Security to be given, when the day of payment is distant.

The testator devised 800*l* to an infant, to be paid by his executor when the said infant should attain to the age of twenty one years. The infant by his guardian exhibited a bill, that the executor might give security for the payment of the money. And so it was decreed. *Swin. a. 40. Law of Ex. 187.*

The testator bequeathed his personal estate to his wife for life, and what she should leave at her death to be equally distributed between his own kindred and hers: If the estate be so small, that she cannot live upon it without spending the stock, it seems she shall not be obliged to give security; otherwise she shall. *Prec. Cha. 71.*

H. 11 Ja. Prowe's case. If a person, possessed of a lease for years, devise that his executor out of the profits thereof shall pay to every one of his daughters 20*l* at their full age; the executor may be sued in the spiritual court, to put in surety to pay the legacies, and no prohibition shall be granted; for this is to issue out of a chattel. *2 Roll's Abr. 285.*

5. Mr. *Wentworth* says, In case an infant be of the age of discretion, to wit, fourteen years, he holdeth it clear, that the payment of a legacy to him made will stand good, whether he who makes such payment have any acquittance or not; for if he have proof of the payment, he is well enough acquitted from any second payment. *Went. 219.* Payment to an infant.

And he thinks, on demand and acquittance tendred, he ought to pay it to an infant of tender years (in presence of his guardian); payment according to the testator's appointment, being the matter which acquitteth the payer. *Went. 220, 221.*

And Mr. *Clerke* says, If a legacy be left to an infant under seven years of age, the father (or next of kin) shall apply to the judge before whom he intends to sue for the legacy, and alledge, that such a person deceased made his will, and appointed such a one executor, and in the said will bequeathed unto his son being an infant (under seven years of age) such a legacy; and that by reason of such age, the said infant hath not a person able and fit to sue for the same; and shall implore the office of the judge in that behalf, and request that curators be assigned to the infant, to sue for and recover the said legacy from the executor: Whereupon the judge usually assigneth such father or next of kin to be curators in that behalf. *1 Ought. 357.*

But if the minor is above seven years of age, the judge doth not ex officio constitute a curator, but the minor is to choose one, either personally, or by commission (as in case where he lives at a great distance, or otherwise), or sometimes by special proxy under his hand and seal, requesting that such curator may be assigned by the judge as aforesaid. *id. 358, 359, 360.*

And if the executor, on suit of the minor by such curator as aforesaid, pay to the curator the legacy due to the minor, he is discharged from any further

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further payment thereof to the minor when he comes of age ; altho' the curator never pay it to the minor, or shall become insolvent : And the reason is, because he pays it by the decree of the judge. And therefore it is advisable for the executor, not to pay the legacy until suit hath been commenced against him by the curator, and he the said executor hath been cited ; and then let him offer to pay the legacy *judicially*, that is, according to the forms of the court ; and the same being entred in the acts of the judge, the executor is discharged. *id.* 362, 3.

And in this case the judge is not wont, nor is obliged, to deliver the legacy to the curator for the use of the minor, until he hath given caution for the indemnity of the judge and of the executor in this behalf, and for the payment thereof to the minor when he shall come of age. *id.* 363.

And in the court of chancery, in the case of *Bullen and Allen*, T. 28 C. 2. An infant exhibited a bill by his guardian, for a legacy of 100 l devised to him. The defendant by his answer confessed the legacy, and that he was always ready to pay it, so as he might be lawfully discharged, which the plaintiff by reason of his infancy could not do ; and therefore insisted, that it might be paid without interest. Which was decreed accordingly, and the defendant to be indemnified. *Cha. Ca. Finch.* 264.

And in the case of *Dyke and Dyke*, H. 25 *Cha.* 2. Where legacies were devised to infants payable at a certain time, which expired during their infancy, and the executor refused to pay the same, because the legatees could not give any discharges by reason of their infancy ; it was decreed, that the master should put out the money at interest in the name of the guardian, or of such other person as he should think fit, and that the defendant should be indemnified against the infants. *Cha. Ca. Finch.* 95.

In the case of *Holloway and Collins*, H. 26 & 27 C. 2. A legacy of 125 l was given to the plaintiff, being but ten years old, and at that age was paid to the plaintiff's father, who died insolvent. This was held by the lord keeper to be good payment : but the attorney general urged very much the ill consequence of this ; for the law must be the same if it were 1000 l, and extends to other cases of like nature, not to legacies only ; and said, that the executor ought to have sued in this court to have paid it. And the lord keeper said, it may be so where the legacy will bear the charge of suit, but not otherwise. But the executor having taken a bond to save him harmless, it was decreed that he should pay it over again, for he had paid it at his own peril. 1 *Cha. Ca.* 245.

But in the case of *Strickland and Hudson*, E. 7 *An.* lord chancellor Cowper said, that the master of the rolls, who had longer experience than himself, would never allow a child's legacy to be paid to the father or mother upon any security whatever, by reason of the strife it might occasion in a family. 3 *Cha. Ca.* 168.

And in the case of *Doyley and Tollferry*, M. 1715 ; a legacy of 100 l was devised to an infant of about ten years of age : The executor paid this legacy to the father, and took his receipt for it. When the infant came of age, his father told him he had received the legacy, but could not pay it him immediately, and said he would not have him trouble the executor, for

for he would give it him. The son rested satisfied with this for about fourteen or fifteen years; and his father and he having carried on a joint trade together, became bankrupts. This legacy of 100l being amongst other things assigned by the commissioners for the benefit of the creditors, the assignee brought a bill against the executor for an account and payment of this legacy. The defendant insisted on the extreme hardship of his case, if he should be obliged to pay the legacy over again; that he had justly paid it to the father, whilst he was in good circumstances; and that if application had been made sooner, he might have had his remedy over against the father; that the father was by nature guardian to his child; and that formerly payment to him was allowed to be good. The lord chancellor said, that if the father had not made the son such promise of recompence, and the son had acquiesced all that time, the case might have been more doubtful; but this promise of the father drew him to forbear applying to the executor sooner; and since the father had not and could not now make good his promise, being a bankrupt, the reason of the son's forbearance was at an end; he thought the rule of this court in not suffering parents to receive their childrens legacies was founded on very good reason; and therefore left hereafter this case should be cited as a precedent, when the circumstances attending it might be forgot, and to discountenance and deter others from paying such legacies to the parents (tho' he did not deny the hardship of that particular case), he decreed for the plaintiff against the executor. 1 *Abr. Cas. Eq.* 300. 3 *Bac. Abr.* 484.

6. By the civil law, a testator cannot enjoin his executor to pay interest for the non-payment of a legacy. And tho' interest or usury be only forbidden by the civil law beyond such a sum, yet it being intirely prohibited by the canon law, it follows *a fortiori* that he cannot do it by that law. *Ayl. Par.* 342.

In what case a legacy shall bear interest, and from what time.

And by the laws of this realm, the receiving of interest for money was for a long time prohibited: but afterwards, from the unreasonableness of the thing itself, and the inconvenience thereof to society, these restrictions vanished by degrees, and it became lawful to receive interest within certain bounds prescribed by the legislature; and as in other matters, so also in the case of legacies, the courts both ecclesiastical and temporal have allowed interest to be paid for legacies withheld in certain instances. And, generally, it is said, if a legacy be bequeathed to be paid divers years after the testator's death, this difference is to be observed; if the day were given in favour of the legatee being an infant, who could not safely receive it any sooner, then he shall have the profit; but if the respite was in favour of the executor, then the legatee shall have the bare legacy without interest.

Wentw. 252.

T. 1684. *Churchill and Speake.* Devise of 500l to his granddaughter then an infant, to be paid at such time and in such manner, as his wife (who was his executrix, and the grandmother) should think fit and best for his said granddaughter. The executrix lived twenty years after the death of the testator, in all which time this legacy was never demanded; and then she having made the defendant her executrix, she died without paying this legacy. And upon a bill exhibited against the executrix

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executrix of the executrix for this legacy; tho' no demand was proved, and tho' the time and manner of paying it was left to the wife; yet it was decreed to be paid with interest from the death of the testator. *Vern. 251.*

E. 1701. Jelliffe and Crew. If a legacy be devised generally, and no time ascertained for the payment, and the legatee be an infant; he shall be paid interest from the expiration of the first year after the testator's death; but it seems a year shall be allowed, for so long the statute of distribution allows before the distribution be compellable, and so long the executor shall have, that it may appear whether there be any debts: but if the legatee be of full age, he shall only have interest from the time of his demand after the year; for no time of payment being set, it is not payable but upon demand, and he shall not have interest but from the time of his demand; otherwise it is in case of an infant, because no laches are imputed to him. But where a certain legacy is left payable at a day certain; it must be paid with interest from that day. *2 Salk. 415. Prec. Ch. 161.*

T. 1722. Maxwell and Wettenball. In this case the following points were resolved: 1. If one gives a legacy charged upon land which yields rents and profits, and there is no time of payment mentioned in the will, the legacy shall carry interest from the testator's death, because the land yields profit from that time. 2. But if a legacy be given out of a personal estate, and no time of payment mentioned in the will, this legacy shall carry interest only from the end of the year after the death of the testator. 3. If a legacy be given charged upon a dry reversion, here it shall carry interest only from a year after the death of the testator, a year being a convenient time for a sale. 4. If a legacy be given out of a personal estate, consisting of mortgages carrying interest, or of stocks yielding profits half yearly, it seems in this case the legacy shall carry interest from the death of the testator. 5. If a legacy be brought into court, and the legatee has notice of it, so that it is his fault not to pray to have the money, or that the money should be put out, the legatee in such case shall lose the interest from the time the money was brought into court; but if the money was put out, the legatee shall have the interest which the money put out by the court did yield. *2 P. Will. 26.*

T. 1727. Nichols and Osborn. The testatrix having a niece an infant about the age of seventeen, devised to her the surplus of her personal estate, to be paid at the age of twenty one; and if she should die before twenty one or marriage, then the testatrix devised it over to another. On the death of the testatrix the question was, who should have the interest of this surplus during the infancy of the niece. It was objected, that this interest ought to be laid up until the niece should come to twenty one or be married, and be then paid to the niece; but if she should die before, in such case it ought to be paid to the devisee over; and that nothing was to be paid before the niece should come to twenty one or be married, because it was not due till then. For the niece it was argued, that the surplus being devised to the niece payable at twenty one or marriage, this was debitum in præsentia, tho' solvendum in

in futuro ; and the devise over, in case she should die before twenty one or marriage, being in nature of a condition subsequent, could not defeat the first devise of the mean profits accruing before the devise over took effect ; as if I should devise lands to an infant, to be void if the infant should die before twenty one, tho' the infant should die before twenty one, yet would he be intitled to the mean profits until the time of his decease : So if I was to devise to one 1000 l, and if he dies before twenty one, then the same to go over ; the devisee, the infant, should have the interest till his death : neither was there any diversity betwixt a devise of a particular sum, and the devise of a surplus ; for this last may by computation be reduced to a certainty : Also when the devise is of a surplus to an infant, and if he dies before twenty one then to go over, the surplus devised over is the same surplus which was devised to the infant ; whereas it would be a different and greater surplus, were it to carry the interest accruing during the life of the infant, added to what was the surplus at the time of the testator's death. And the court took it clearly, and decreed, that the infant niece was intitled to the interest of the surplus, which should incur from the death of the testatrix, and in the life time of the niece, tho' she should happen to die before her attaining the age of twenty one or marriage. 2 P. Will. 419.

M. 1727. *Bilson and Sanders*. A legacy was given to an infant, the testator having a great deal of money in bank stock ; the executor was residuary legatee ; a bill was brought in the exchequer for the legacy ; and the question was, whether it should bear interest, and from what time ? Chief baron Pengelly and baron Hale ; It is a certain rule, that where a fund is certain, as where charged on land, it shall bear interest, because it plainly appears the rents are received ; so the fund on which it is charged produces a profit here, it is equally certain, and therefore should bear interest, and should be from the testator's death. But this was opposed by Carter and Comyns, barons, that it should only bear interest from a year after the testator's death ; for as legacies are to be paid after debts, the executor has that time to inquire, till which time they are not payable, so not to bear interest : which was agreed. A difference was offered to be made, that as there was a legacy to an infant, it could not be safely paid, and therefore could not bear interest ; to which it was answered by the chief baron, that it might be safely paid into the hands of an infant, having proper evidence of the payment, as in *Wentworth's Executor* 313. And by Carter ; it may be paid into the hands of the guardian, having evidence ; but if he takes security from the guardian which should prove defective, there as he doth not rely on the security the law gives, he must depend on that taken at his peril. *Select cases in chancery*. 72. *Bunb.* 240.

M. 1733. *Ferrers and Ferrers*. The countess dowager of Ferrers was by settlement and will of her late husband earl Robert, intitled to a jointure estate of 1000 l a year, but was kept out of possession by earl Washington, the son of earl Robert by a former venter ; and now insisted upon the arrears, and interest, from the time of her husband's death ; comparing it to the case of arrears of an annuity, or a rent charge, which

are decreed to be paid with interest. By Talbot lord chancellor: The arrears of an annuity or rent charge are never decreed to be paid with interest, but where the sum is certain and fixed; and also where there is either a clause of entry, or nomine poenæ, or some penalty upon the grantor which he must undergo, if the grantee sued at law; and which would oblige him to come into this court for relief, which the court will not grant but upon equal terms, and those can be no other but decreeing the grantor to pay the arrears, with interest for the time, during which the payment was withheld: but interest for the rents and profits of an estate was never decreed yet, the same being intirely uncertain. And tho' it may be said, that the lady is intitled to an estate of 1000 l a year, yet that is not sufficiently certain; being only a perception of the profits of an estate; which are not to be paid at any one certain time, but only as the tenants of the land bring them in, some at one time, some at another. *Caf. Talb. 2.*

Maintenance
and educa-
tion, how far
to be allowed.

7. *M. 16 C. 2. Rennesey and Parrot.* A legacy was made payable at the age of twenty one years. The legatee by his guardian brought a bill against the executor for maintenance, suggesting that he had none. The executor demurred; for that the plaintiff was under age, and the legacy was not payable till twenty one, and therefore no cause of suit. But the demurrer was overruled. *1 Cha. Ca. 60.*

M. 1684. Barlow and Grant. Upon a bill for 100 l legacy given to a child, the defendant insisted upon an allowance of 16 l a year, for keeping the legatee at school. It was objected, that only the bare interest of the money ought to have been expended in his education, and not to have sunk the principal, as in this case the defendant had done. But the lord keeper thought it fit and reasonable to be allowed; and said, the money laid out in the child's education was most advantageous and beneficial for the infant, and therefore he should make no scruple of breaking into the principal, where so small a sum was devised, that the interest thereof would not suffice to give the legatee a competent maintenance and education; but in case of a legacy of 1000 l or the like, there it might be reasonable to restrain the maintenance to the interest of the money. *1 Vern. 255.*

But if the legacy is devised over, it seemeth to be otherwise; and that the court in such case will not diminish the principal, but only allow the interest thereof to the first legatee, until the time that the legacy shall become payable. *1 Cha. Ca. 249. Leech and Leech. H. 26 & 27 C. 2. Prec. Cha. 195. Brewin and Brewin. E. 1702.*

E. 1722. Harvey and Harvey. The testator being seised of a real estate, and possessed of a personal estate, and having several children, deviseth all his real and personal estate to his eldest son, charging the same with 1000 l a piece to all his younger children, payable at their respective ages of twenty one; but in the will no notice is taken of maintenance for the younger children in the mean time. The younger children bring their bill, in order to recover interest, or some maintenance during their infancy. Upon which, the master of the rolls decreed, that the younger children should recover maintenance. He observed, that these
being

being vested legacies, and no devise over, it would be extreme hard that the children should starve, when intitled to so considerable legacies, for the sake of their executors or administrators, who in case of their deaths would have the said legacies: That in this case, the court would do, what in common presumption the father (if living) would and ought to have done, which was, to provide necessaries for his children: That a court of equity would make hard shifts for the provision of children; as where younger children were left destitute, and the eldest an infant, equity would make such a liberal allowance to the guardian of the eldest, as that he might thereout be inabled to maintain all the children; and for the same reason, the court would likewise take a latitude in this case; that since interest was pretty much in the breast of the court, tho' the will were silent with regard to that, yet it should be presumed that the father, who gave these legacies, intended they should carry interest, if the estate would bear it; for every one must suppose it to have been the intention of the father, that his children should not want bread during their infancy: That for this reason it had been held, that tho' a legacy were devised over in case of the legatee's dying before twenty one, yet the infant legatee ought to have interest allowed him during his infancy, in order for his maintenance; with this difference only, that where the estate has appeared to be small, the court, in whose discretion it always lies to determine the quantum of interest, has ordered the lower interest: And it seemeth, that if one, not a parent, gives a legacy to an infant, payable at twenty one, without any devise over, and the infant has nothing else to subsist on; the court will order part of this legacy, in order to provide bread for the infant, to be paid presently, allowing interest for the same to the person paying it, out of the remaining principal; tho' this is done very sparingly. 2 P. Will. 21.

8. Nov. 4. 1684: *Palmer and Trevor*. Morley devised 100 l to his daughter Eliz. Palmer, a feme covert, and dies. The executor pays it to Elizabeth; who spends it in her own maintenance. Her husband sues for it; and the question was, whether this was a good payment to the wife, it being in proof that at the time of making the will, Palmer and his wife lived apart, and the husband did not allow her maintenance, and so it is a strong presumption that the deviser intended this for her separate use. By the lord keeper: If it had been so given in exprefs terms, the payment to her had been good; but as it is, the husband must have it decreed: he said, that in case where a tenant paid his rent to his landlady, not knowing that she was married, yet the husband made him pay it over again, and no help for it. Moreover, the will appointing the legacy to be paid within six months after the testator's decease; the lord keeper decreed the husband interest from that time, but if no time limited no interest. 1 Vern. 261.

Payment to a
feme covert.

9. In the case of *Grove and Banfon*, M. 21. *Charl.* It is said generally, that an executor is not bound to pay a legacy, without security to refund, in case there be a defect of assets. 1 Cha. Caf. 149.

And in the case of *Noel and Robinson*, M. 1682, it is said, that if they give sentence in the ecclesiastical court for the payment of a legacy,

prohibition

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prohibition will lie, unless they take security to refund in case of insufficiency of goods to discharge debts, and the like; for a diminution of legacies is to be made *pro rata*, if the testator's estate will not extend to pay them all. 2 *Ventr.* 358. 3 *Bac. Abr.* 483. *Ayl. Par.* 343.

And in a court of equity, common justice will compel a legatee to refund, altho' no security hath been given for that purpose. 1 *Vern.* 93, 94.

So if the testator hath given bond with any person, for the payment of a debt after certain years to come, or for the performance of any covenants or contracts at a future day; altho' the executor in this case hath goods in his hands sufficient to pay the legacies, yet if the said sum for which the testator was bound is not paid, or the said covenants be not fulfilled, in such case, the executor for his indemnity may offer judicially the legacy upon this condition, that the legatary first give proper security to keep him indemnified with respect to the debts and covenants aforesaid, at least proportionably, regard being had to the other legacies. Which if the legatary shall refuse, the executor may leave the same with the register upon the said condition. 1 *Ought.* 369, 370.

The form of the security to be given as aforesaid, may be this:

"Know all men by these presents, &c." (as in the common form of bonds.)

"Whereas E. F. late of — deceased, did on the — day of — duly make and execute his last will and testament, and did therein amongst other legacies give and bequeath unto the abovebound A. B. the sum of — and therein and thereof did name and appoint the abovenamed C. D. executor, who hath proved the same in the consistory court of — and taken upon himself the execution thereof: And whereas the said C. D. hath at the request of the said A. B. actually paid to him the said A. B. the whole legacy of — altho' there may be cause to apprehend a deficiency of assets for payment of the other legacies: The condition of this obligation is such, that if such deficiency shall actually and bona fide happen, the said A. B. his executors or administrators, shall within — days next after request in that behalf to him made, refund and pay back unto him the said C. D. his executor or executors, administrator or administrators, his or their rateable part or share of such deficiency, Then this obligation to be void, otherwise of force."

If assets fall short, in what case legatees shall abate.

10. Generally, it is said, if a man bequeath 20 l to one, and 20 l to another, and 20 l to a third, and makes his executor and dies, having goods but to the value of 20 l in all; of which goods the executor maketh an inventory: in this case he may pay which of the three he pleaseth his whole legacy, and the other two are without remedy; or he may, if he please, pay every one of them a rateable part: and in case the executor make no inventory, yet he is chargeable no further than the value of the goods; and so if every legatary in such case should sue him, they must prove sufficiency of goods, or otherwise they shall get nothing. *Curf.* 186.

But

But Mr. Clark says (agreeable to the rule in the courts of equity) If after payment of the debts and funeral expences there be not sufficient for all the legataries, there must be a proportionable distribution according to the quantity of each legacy. 1 *Ought.* 366.

And Dr. Swinburne says, If the executor do make an inventory according to the laws and statutes of this realm; then he need not pay to any legatary his whole legacy, tho' he be first named in the will, in case there is not sufficient to answer unto every legatary his whole legacy; but may retain a rateable part or proportionable deduction from every legacy; saving in certain cases: whereof one is, when some special thing is bequeathed, as the testator's signet, or his white horse; which special legacy (as some do deem) is to be satisfied and paid wholly without diminution, in respect of any other general legacies, or of legacies which consist in quantity. Another case is, when the father doth bequeath something to his daughter for her dower, or towards her marriage. Another is, when the testator doth bequeath any thing in satisfaction or recompence of some injury by him done, or of goods evil gotten. For those legacies are not to be diminished by reason of other general legacies, or legacies consisting in quantity, which shall remain wholly unsatisfied, rather than those foregoing legacies shall be diminished; and consequently in these cases, it is not in the power of the executor, to gratify any other legatary at his election. *Swin.* 227, 228.

And he says further, that if the executor enter to the testator's goods, and will make no inventory thereof, then may every legatary recover his whole legacy at his hands; for in this case the law presumeth, that there is sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same: whereas otherwise the executor is presumed not to have any more goods which were the testator's, than are described in the inventory, the same being lawfully made. *Swin.* 228, 229.

And altho' the testator made no provision for refunding, yet the common justice of a court of equity will compel a legatee to refund; and it is certain that a creditor shall compel a legatee, and that one legatee shall compel another to refund, where there is a defect of assets. 1 *Vern.* 94.

And even if one of the legatees get a decree for his legacy, and is paid, and afterwards a deficiency happens; the legatee who recovered shall refund notwithstanding. 1 *P. Will.* 495.

But if the executor had at first enough to pay all the legacies, and afterwards, by his wasting the assets, occasions a deficiency; the legatee who has recovered his legacy, shall have the advantage of his legal diligence, which the other legatees neglected by not bringing their suit in time. *Id.*

And altho' a legatee shall refund against creditors, if there be not sufficient assets to pay all the debts; and likewise against legatees, where all of them have not an equal share, in regard of assets falling short; yet it hath been said, that an executor himself shall never bring a legacy back when he hath once assented to it, unless he paid the debts of the testator by compulsion. *M.* 1682. *Noel and Robinson.* 1 *Vern.* 90. 2 *Ventr.* 358.

And

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And the author of the *Law of Executors* saith; that if an executor voluntarily pay a legacy, and afterwards debts appear, he cannot compel the legatee in equity to refund. *Law of Ex.* 186.

But more particularly, the author of the *Law of Testaments* observeth, that if an executor applies the assets in satisfaction of legacies, and afterwards debts appear of which he had no notice at the time of paying the legacies, he may compel the legatees to refund. 1 *Ch. Cas.* 136. So he may, if compelled by a decree in chancery to pay legacies: But if an executor voluntarily pays a legacy, and afterwards assets prove deficient to pay the other legacies; neither the executor nor any of the other legatees shall compel such legatee to refund. 2 *Vern.* 205. *Law of Test.* 260, 261.

But in the case of *Noel and Robinson* before mentioned, it was said by the lord chancellor to be a point not as yet determined, whether the executor himself, after he hath once voluntarily assented to a legacy, shall compel the legatee to refund. 1 *Vern.* 94.

And in the case of *Davis and Davis*, *E. 4 G.* On a bill by an executor against a legatee, to refund a legacy voluntarily paid him by the executor, the assets falling short to satisfy the testator's debt; it was decreed by Sir Joseph Jekyll, master of the rolls, that the defendant should refund to the plaintiff; and that an executor may bring a bill against a legatee to refund a legacy voluntarily paid him, as well as a creditor; for the executor, paying a debt of the testator out of his own pocket, stands in the place of the creditor, and has the same equity against a legatee to compel him to refund. *Viner. Devise. Q. d.* 35.

So where a *specific* legacy is devised, the legatee must have it intire, though there are not sufficient assets to pay the rest of the legacies: But if 100 l is devised to one, and several money legacies to others, and the testator directs that the legacy of 100 l shall be paid *in the first place*; yet if the other legacies fall short, the legatee of 100 l must make a proportionable abatement of his legacy. *H.* 1681. *Brown and Allen.* 1 *Vern.* 31.

In the case of *Oneale and Meade*, *H.* 1720. A man seised of an estate in fee which he had mortgaged for 500 l, and also possessed of a leasehold, devised the mortgaged estate to his eldest son in fee, and the leasehold estate to his wife, and died, leaving debts which would exhaust all his personal estate, except the leasehold given to his wife. The question was, whether there being (as usual) a covenant to pay the mortgage money, the leasehold premises devised to his wife should be liable to discharge the mortgage. It was decreed by the master of the rolls, that as the testator had charged his real estate by this mortgage, and also specifically bequeathed the leasehold to his wife, the heir shall not disappoint her legacy, by laying the mortgage debt upon it, as he might have done had it not been specifically devised; and tho' the mortgaged premises were also specifically given to the heir, yet he must take them with their burden, as probably they were intended; and that by this construction, each devise would take effect: And that this resolution did not in the least interfere with the case of *Clifton and Birt*, *M.* 1720. (1 *P. Will.* 678.) because in that case there was no mortgage. 1 *P. Will.* 693.

And

And as there is a benefit to a specific legatee that he shall not contribute, so there is a hazard the other way; for instance, if such specific legacy, being a lease, be evicted, or being goods be lost or burnt, or being a debt be lost by the insolvency of the debtor, in all these cases the specific legatee shall have no contribution from the other legatees, and therefore shall pay no contribution towards them. 1 *P. Will.* 540.

Allo charities, tho' preferred by the civil law, yet they ought to abate in proportion. 2 *P. Will.* 25.

And if the testator's personal estate is not sufficient to pay all legacies, the executors having legacies bequeathed them shall abate in proportion with the other legatees, even tho' the legacies be given them for their care and trouble, and not generally; for those are only words of course; and as they need not take upon them the office unless they please, they accept the legacies subject to that contingency. 2 *P. Will.* 25. *Barnard. Cha. Rep.* 435.

In like manner land legatees and money legatees shall abate proportionably. 2 *Cha. Ca.* 155.

If the executor hath only bad debts, he may offer to assign them to the legatee, and shall be quit. 1 *Ought.* 370, 1.

If a man by will gives a lease, or a horse, or any specific legacy, and leaves a debt by mortgage or bond in which the heir is bound; the heir shall not compel the specific legatee to part with his legacy in ease of the real estate; for though the creditor may subject this specific legacy to his debt, yet the specific or other legatee shall in equity stand in the place of the bond creditor or mortgagee, and take as much out of the real assets, as such creditor by bond or mortgage shall have taken from his specific or other legacy. 1 *P. Will.* 730.

But if one owes debts by bond or mortgage, and deviseth his lands to another in fee, and leaves a specific legacy, and dies, and the bond creditor or mortgagee comes upon the specific legacy for payment of his debt; the specific legatee shall not stand in the place of the bond creditor or mortgagee to charge the land: because the devisee of the land is as much a specific devisee as the legatee of a specific legacy; for it was as much the testator's intention that the devisee should have the land, as that the other should have the legacy; and a specific legacy is never broke in upon, in order to make good a pecuniary one. 3 *P. Will.* 324. 2 *Salk.* 416.

But if a man, indebted by mortgage, deviseth his lands to another in fee (after payment of his debts and funeral charges), and also doth bequeath divers pecuniary legacies, and the personal estate is not sufficient to satisfy both the legacies and the mortgage; in such case, if the mortgagee shall not hold to the real, but shall fall upon the personal estate, the legatees shall stand in his room for so much out of the real estate, as he shall take out of the personal; that being a proper fund for their payment. *Cas. Talb.* 53.

So if a man give legacies to his daughters, charging his real estate with the payment thereof; and other legacies to his brother, without charging his real estate with the payment of these: if the daughters recover their legacies out of the personal estate, then the brother shall stand in the place

of

Co-executor
dying, who
shall be sued.

of the daughters, and take so much out of the land for his legacy, as the daughters had exhausted out of the personal assets. 2 *P. Will.* (619.)

11. Where there are divers executors, and some of them are dead, the legatary must sue the surviving executors, and not the executors or administrators of those that are dead. And if all the executors are dead, he must sue the executors or administrators of him that died last, and not the executors or administrators of the rest: And the reason is, because it is presumed, that the goods of the deceased not administered by the other executors, remained with the surviving executor; or if they did not, it was through his own default; because when the other executors were dead, he might and ought to have proceeded against their executors or administrators for restitution of the goods not administered. 1 *Ought.* 364.

II. Concerning the distribution of intestates effects.

And herein,

- i. *Of the statutes of distribution.*
- ii. *Of customs in particular places.*
- iii. *Of the custom of the city of London in particular.*
- iv. *Of the custom of the province of York.*
- v. *Of the custom within the principality of Wales.*

i. *Of the statutes of distribution.*

BY the 22 & 23 C. 2. c. 10. commonly called the statute of distribution, it is enacted as followeth: *All ordinaries, as well the judges of the prerogative courts of Canterbury and York, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may and are enabled to proceed and call administrators to account, for and touching the goods of any person dying intestate; and upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear (after all debts, funerals, and just expences of every sort first allowed and deducted) amongst the wife and children, or childrens children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks pro suo cuique jure, according to the laws in such cases, and the rules and limitations hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same by the due course of his majesty's ecclesiastical laws: saving to every one supposing him or themselves aggrieved, their right of appeal, as was always in such cases used.* f. 3.

Provided, that this act, or any thing herein contained, shall not any ways prejudice or hinder the customs observed within the city of London, or within the province of York, or other places, having known and received customs peculiar

liar to them; but that the same customs may be observed as formerly, any thing herein contained to the contrary notwithstanding. §. 4.

And all ordinaries and other persons by this act enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates, in manner and form following; that is to say, one third part of the said surplusage to the wife of the intestate, and all the residue by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his life time, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made: And in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his life time by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the life time of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated: But the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate. §. 5.

And in case there be no children, nor any legal representatives of them; then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them. §. 6.

Provided, that there be no representations admitted among collaterals, after brothers and sisters children. §. 7.

And in case there be no wife, then all the said estate to be distributed equally to and amongst the children. §. 7.

And in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives, as aforesaid, and in no other manner whatsoever. §. 7.

Provided also, and be it enacted, to the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made, till after one year be fully expired after the intestate's death; and that such and every one to whom any distribution and share shall be allotted, shall give bond with sufficient sureties in the said courts, that if any debt or debts truly owing by the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear, that then and in every such case he or she shall respectively refund and pay back to the administrator his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts so discovered after the distribution made as aforesaid. §. 8.

Provided always, and be it enacted, that in all cases where the ordinary hath used heretofore to grant administration cum testamento annexo; he shall con-

time so to do, and the will of the deceased in such testament expressed shall be performed and observed, in such manner as it should have been if this act had never been made. f. 9.

And by the 29 C. 2. c. 3. f. 25. for explaining the said statute, it is declared, that nothing therein shall extend to the estates of *femes covert* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act.

And by the 1 J. 2. c. 17. If after the death of a father any of his children shall die intestate without wife or children, in the life time of the mother; every brother and sister, and the representatives of them, shall have an equal share with her, any thing in the said act to the contrary notwithstanding.

[Of any person dying intestate] T. 8 W. *Petit and Smith*. Prohibition was granted to the delegates, to stay a suit there, because they compelled an executor to make distribution of the surplus, he having 50 l. devised to him as a legacy; because, there being a will, and an executor, the spiritual court cannot compel distribution, but only where the party dies intestate. L. Raym. 86.

And in the case of the *King* and *Sir Richard Raines*, M. 10 W. If an executor be sued in the ecclesiastical court to make distribution, he not being residuary legatee; though that were allowed by the canon law, yet the king's bench would grant a prohibition to stay any such suit; for all suits for distributions were prohibited by the king's bench, until the statute of the 22 & 23 C. 2. c. 10. made them lawful; and they are only lawful so far as is warranted by that statute, which is only in case of persons dying intestate. L. Raym. 363.

E. 3 G. 2. *Hatton and Hatton*. Strange moved for a prohibition to the prerogative court, in a suit there instituted by the next of kin against the executor, to make distribution of the surplus, there being a specific legacy to the executor; for that altho' there have been variety of decisions upon this point in courts of equity, where they have sometimes held the executor to be a trustee for the next of kin as to the surplus, yet there was no instance of the spiritual court's judging of a trust, or setting up any interest contrary to the common law. He insisted, that in the case of a will the judge below is *functus officio*, when he hath granted probate, as to all purposes but calling for an inventory according to the statute of the 21 H. 8. c. 5. And he cited the case of *Petit and Smith*, as reported in the 5 Mod. 247. where the testator gave 5 l. to the executor, and the daughter cited him to make distribution, and a prohibition was granted. And in a report of the same case in *Comb.* 378. it is said by Holt chief justice, they never pretended to distribution in the case of an executor; and they only do it in the case of an administrator by virtue of the statute; and he denied the notion in 2 Inst. 33. that executors must divide. Dr. Sayer on the contrary endeavoured to maintain, that the spiritual court had concurrent jurisdiction with the court of chancery in this case, as well as in legacies; and insisted that this is a partial intestacy, as to the surplus. But the court was clearly of opinion, that the spiritual court could not intermeddle; and said, that in case of an intestacy, they

used to be prohibited, as in *Carter* 125. 1 *Lev.* 233. and that the statute of distribution enlarged, and not barely confirmed their power, as appears by the history of that statute in *Raym.* 496, &c. And the rule for a prohibition was made absolute. And the court offered, that if the common lawyers on the doctor's side, who were *Reeve*, *Lee*, and *Fazakerley*, would say that they thought there was any thing in it, the plaintiff should declare in prohibition; but they declined it. *Str.* 865.

To order and make just and equal distribution] *T. 10 W. Clerke* and *Clerke*. *Clerke* died intestate. His wife took out letters of administration to him. *Clerke*, brother to the intestate, cited the defendant into the spiritual court, to make distribution of the intestate's estate. The defendant there suggests, that the brother hath goods of the intestate in his hands to the value of 200 l. And upon this the spiritual court orders him to bring the 200 l into court, to the end it may be distributed. And for not bringing it in they excommunicate him. Upon which he moves in the king's bench for a prohibition; and it was granted as to the whole process that compelled him to bring in the 200 l. For by the court; The spiritual court hath power to make distribution of the estate, when it is come in, but not to fetch it in; because that is to hold plea of debt: but the spiritual court might refuse in this case to proceed to the distribution, until the brother had brought in the 200 l, but they cannot excommunicate him for not bringing it in. *L. Raym.* 585.

Distribution] Where there is only one person that can take, the statute vests the right in that person; altho' in such case it is not strictly and literally a distribution. 3 *P. Will.* 50.

Shall not any ways prejudice or hinder the customs observed within the city of London, or within the province of York, or other places] Which customs will be considered in their order afterwards.

One third part of the said surplusage to the wife of the intestate] And this, it is said, altho' she be a papist. For in the case of dying intestate, it is the act of the law. It is the legislator that gives these distributive shares to the widow and next of kin. It is a succession *ab intestato* to a personal estate, similar to a descent of land, where an heir, tho' a papist, if above the age of 18 years and 6 months, may inherit. *T. 1730. Davers and Dewes.* 3 *P. Will.* 48.

By the same reason, it should seem, that a papist is capable of taking as tenant by the curtesy, or tenant in dower. *ibid.* 49. in a note by the editor.

The residue—to and amongst the children] An infant *in ventre sa mere*, at the time of the death of the father, was held clearly, by the lord chancellor, to be intitled to a share by the statute of distribution; for he is, in the eye of the law, a child, and ought to be provided for as well as the rest. *M.* 1698. *Ball and Smith.* 2 *Freem.* 230.

Other than such child or children, not being heir at law] Altho' by this statute the heir at law shall not abate, in respect of the land which he hath by descent or otherwise from the intestate; yet if he hath had any advancement from his father in his life time, otherwise than by land as aforesaid, he shall abate for the same, in like manner as the other children.

In like manner it seemeth that *cobheireffes* shall bring together into hotchpot, such advancement (not being lands) as they shall respectively have received from their father, before they shall be intitled to receive their several distributive shares; agreeably to the general purport of the act, which is, evidently, to promote an equality as much as may be.

Note, Littleton saith (1 *Inst.* 176.) that *hotchpot* signifieth a pudding; unto which his learned commentator assenteth: but this doth not explain to us the meaning of the word, but carries us further from it; for it doth not import that kind of food in general, but metaphorically such only as is compounded of divers ingredients. *Hotch* is a Saxon word, not yet altogether out of use, and signifieth to *shake*: And *pot* is a word well known. And the compound *hotch pot* is nothing but shaking things together in an urn or other vessel; and is easily transferred to a commixture of the childrens portions. And this is what by the civilians is called *colectio bonorum*.

Heir at law] E. 5 G. 2. Pratt and Pratt at the rolls. Lord chief justice Pratt died seised of borough english lands, leaving several children. And having made no will, it became a point upon the statute of distribution, whether the youngest son (to whom the lands descended by the custom of borough english) should abate for these lands, or should be considered as an heir at law, who by the statute is to have a distributive share without any allowance for lands by descent. And it was ruled by Sir Joseph Jekyll, master of the rolls, that he should allow for these lands. For he said, the statute only intended to provide for the heir of the family, who is the common law heir, and not for one who is only heir by custom in some particular places. *Str.* 935.

But in the case of *Lutwyche* and *Lutwyche*, E. 1733. Thomas Lutwyche, esquire, died intestate, possessed of a personal estate, and seised of a copyhold in fee, at Turnham Green, which was in the nature of borough english. The question was, whether the youngest son, upon whom the copyhold descended, should have an equal share with the other children of the personal estate, exclusive of the copyhold, or only so much as with that copyhold would make his portion equal to that of the other children. By Talbot lord chancellor: The heir at law is the eldest son, and not the heir in borough english; and the exception in the statute extends only to the eldest son. Yet nevertheless the youngest son, who is heir in borough english, shall not bring the borough english estate into hotchpot. There is no law to oblige him to do this, but only this statute; and there are no words in the statute that require it: for the statute speaketh only of such estate, as a child hath by settlement, or by the advancement of the intestate in his life time. And it was decreed, that the youngest son should have an equal share with the other children, without regard to the value of the borough english estate.

And the case of *Pratt* and *Pratt* came after this case before the lord chancellor Talbot; and he reversed the decree of the master of the rolls, and decreed agreeable to this case. *Cas. Talb.* 276.

Who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his life time] It hath been determined, that small
incon-

inconsiderable sums, occasionally given to a child, cannot be deemed an advancement or part thereof. Thus maintenance money, or allowance made by the father to his son at the university, or in travelling, or the like, is not to be taken as any part of his advancement; this being only his education: and it would create charge and uncertainty, to inquire minutely into such matters. So, putting out a child apprentice, is no part of his advancement, for it is only procuring the master to keep him for seven years instead of the parent. *Hender and Rose*, at the Rolls, T. 1718. But the father's buying an office for the son, tho' but at will, as a gentleman pensioner's place, or a commission in the army, these are advancements pro tanto. *Norton and Norton*, M. 1692. By the lords commissioners. *Rawlinson and Hutchins*. 3 P. Will. 317.

Also a provision made by a *marriage settlement*, altho' it is in nature of a purchase, yet is such an advancement, as that a child claiming a distributive share shall first bring the said advancement into hotchpot. As in the case of *Phyney and Phyney*, H. 1708. The father, on his son's marriage, covenanted in case of a second marriage, to pay to the first son by the first wife 500l. There was a son, and several other children, of the first marriage. The father of these children died intestate. By the court: The heir must bring the 500l into hotchpot, altho' in nature of a purchaser under a marriage settlement. 2 Vern. 638.

So in the case of *Edwards and Freeman*, M. 1727. Before King lord chancellor, assisted by Raymond chief justice, and the master of the rolls, and Price and Fortescue justices. Mr. Freeman, on his marriage, entred into articles, in consideration of the said marriage, and of 4000l portion, to settle an estate to raise portions for daughters, in case there were no sons, that is to say, if but one daughter the sum of 5000l, if two or more then the sum of 6000l equally amongst them, to be paid at their respective ages of 18 years, or days of marriage, which should first happen; and 80l a year maintenance in the mean time to each daughter. The marriage took effect; and they had issue one daughter only, and no son. Then the wife dies. Afterwards Mr. Freeman married a second wife; and had by her a son and a daughter; and died intestate, leaving a personal estate to the amount of 20000l. The daughter by his first wife, at that time, was about 12 years of age; and some time after, married the plaintiff Mr. Edwards: And they brought their bill, to have an account of the personal estate of Mr. Freeman, and their distributory share thereof. And the only question was, whether this 5000l should not be looked upon to be so far an advancement of the plaintiff the wife of Mr. Edwards, that if she would have any farther share of her father's personal estate, they must bring this 5000l into hotchpot.—For the plaintiffs it was argued, that they were intitled to a distributory share, without regard to this 5000l, which was no advancement, either within the words or meaning of the act, which intended only an advancement of children after they are in being, and when they are about being married or disposed of in the world; but this, if any, was an advancement long before the plaintiff was born, and when it was wholly unknown and uncertain whether there ever would be such a daughter: That it was likewise contingent and uncertain,

tain, after she was born, whether she would ever be intitled to this fortune or not; for if she had died before 18 or marriage, it would have sunk into the inheritance, for the benefit of the heir; and she was but 12 years of age at the time of her father's death, and therefore might have died before she was intitled to this 5000l: That the statute must operate, either at the time of the father's death, or within a year after at furthest; but in this case the plaintiff was not intitled to her 5000l, either in her father's life time, or within a year after; and the distribution was not to wait, till it should appear whether she would attain 18 or be married: That this 5000l was not a voluntary provision moving from the father, but the plaintiff was a purchaser thereof, in consideration of her mother's portion; and suppose a child had money of his own, and agreed with his father, in consideration thereof, to have a portion from his father, after his death; or if a collateral relation had purchased such a portion from the father for his child, certainly this would not be an advancement; and the intent of the statute was, to make them all equal out of the father's personal estate, not out of what was purchased for them by others, or by the mother, as in this case.—On the other side, it was argued for the defendants, that the 5000l thus provided for by the settlement, was an advancement within the meaning of the statute; which appears throughout to intend and preserve an equality between the children: That the statute makes no distinction, whether it was a voluntary provision of the father, or arose from the contract of the parties; and a child provided for either way, is provided for; and it is not like the cases put, where a child, either with his own or a relation's money, purchases an estate, or a sum of money from the father, but a direct sale, as much as it would have been to any stranger: That this portion, tho' not payable till after the father's death, was nevertheless a provision for her by him, in his life time, as the act speaks; as the principal part of it, to wit, the security, was executed by him in his life time; and as he was not at liberty to controul it; and suppose he had given such a portion payable at his death, this would certainly have been a good provision within the statute; and here the portion is payable as soon as possibly it can be wanted, namely, at 18 or marriage, and a maintenance of 80l a year in the mean time; and tho' it is true, that a portion out of lands sinks in the inheritance, if the party dies before it becomes payable, which if it were a personal estate it would not, yet that is not material here, since the statute makes no distinction whether the portion is payable out of the real or personal estate: That if a bill had been brought immediately after the father's death for a distribution, there could be no inconvenience in setting apart a sum to answer the contingency, when it should happen, no more than in the case of debts, which is every day done; and there are some whose estates are not got in till several years after their deaths; and a distribution may very properly be made thereof from time to time, as they come in.—And the court were all clear of opinion, that this was an advancement by the father in his life time, within the meaning of the statute tho' contingent and future, so that she could not have that and her distributory share likewise. And the master of the rolls said, that the civil law made no difference between

between a real and personal estate, but only moveable and immoveable; and the words of the act, which speak of a provision made by the father in his life time, are very proper to distinguish between that and a provision made by his will. And the chief justice said, suppose the father had left but 2000l personal estate, it would be extremely hard, that the eldest daughter should have her 5000l, and a share of the 2000l also. And the lord chancellor said, he thought any settlement in or out of lands, either by annuity, rent, or portion, would be a provision within the statute; and that such provision might be valued and brought into the collatio bonorum, if they think it worth their while; that the 5000l, whether called contingent or not, is an interest, and such a one as would happen within a reasonable time, to wit, six or seven years after the father's death; that the distribution must be made as the estate stands at the father's death, and the parties are to give bond to refund, if debts afterwards appear; and future debts due to the intestate must be distributed as they can be got in; that here the contingency has happened, and she is now at liberty to say, whether she will stick to that provision, or bring it into the computation of collatio bonorum, in order to have an equal share with the rest. But as to the 80l a year maintenance, that is not to be brought in, being only for the education and maintenance of the daughter, which the parents were best judges of.—And accordingly the decree was pronounced.

1 *Abr. Eq. Cas.* 249.

So in the case of *Lloyd and Twitsham*, H. 1715; the lord chancellor Cowper was of opinion, that the word *portion* in the statute, with respect to younger children, includes an estate in *land* as well as in money; and that this land, in the computation of the estate to be distributed, is to be added to, and computed with the other parts of it: but with respect to the eldest son, whatever land came to him from his father, by descent, or otherwise; he is to have his share, without any consideration of the value of such land. *Viner. Executors.* [Z. 10.] 3.

So if the father settles a *rent* out of his lands upon a younger child, this is an advancement. 2 *P. Will.* 441.

Likewise if the father by deed settles an *annuity* upon a child, to commence after his death; this is an advancement pro tanto: and by the same reason, a *reversion* settled on a child, as it may be valued, is an advancement also. 2 *P. Will.* 442.

But whatever a child receives out of the *mother's* estate, it is said, shall not be brought into hotchpot. As in the case of *Holt and Frederick*, T. 1726. A man married, and had three children, two sons and a daughter: His wife survived him; and having, out of her own estate, given a 1000l to her daughter in marriage, died intestate, leaving those three children. The question was, whether the daughter, who had received this 1000l, ought to bring it into hotchpot, before she should receive any further share of her mother's personal estate. The lord chancellor King said, it weighed with him, that the act of distribution was grounded upon the custom of London, which never affected a *widow's* personal estate; and that the act seems to include those within the clause of hotchpot who are capable of having a wife as well as children, which must be husbands only. And so in this case

case (tho' without much debate) his lordship ruled, that the daughter should not bring the 1000l, which she had received in her mother's life time, into hotchpot. 2 *P. Will.* 356.

And if a child who has received any advancement from his father shall die in his father's life time, leaving children; such children shall not be admitted to their father's distributive share, without bringing their father's advancement into hotchpot: As in the case of *Proud and Turner, M.* 1729. A father had several children, and in his life time advanced in part one of them. The child thus advanced in part died in his father's life time, leaving issue. Afterwards the father died intestate, possessed of a considerable personal estate. It was ruled, that the issue of the dead child must bring into hotchpot what their father received in part of advancement, as he, if living, must have done; in regard the issue stands in the place and stead of the father, claims under him, and cannot be in a better condition then the father if living would have been, and had claimed his distributive share. 2 *P. Will.* 560.

And the reason is, because such children do not take in their own right, but as representing their father deceased.—But whether those grandchildren, having been advanced some more some less by their father in his life time, shall bring their several advancements into hotchpot one with the other, before they shall distribute their deceased father's share of their grandfather's personal estate, doth not appear to have been determined. If their father also died intestate, then it seemeth that they shall be required to bring into hotchpot; for in such case they take, not from their grandfather, but from their father: and this brings it within the general rule aforegoing.

But where there are only grandchildren, their fathers or mothers respectively having died in the life time of their grandfather; in such case, they take in their own right, and not by representation of their father or mother deceased. Whether these also shall bring into hotchpot, either all together, or those descended from the same stock amongst themselves respectively, may upon the like grounds be matter of doubt. But it seemeth that this case is farther off from the rule than the former. For here they do not take by representation, but each in his own right. And the statute doth not seem to require that the collatio bonorum shall extend further than to children, or the *representatives* of such children: In like manner as the custom of London doth not extend to grandchildren (as will appear afterwards); so neither doth the custom of the province of York.

A doubt likewise may arise, and the solution thereof will be the same, where a grandchild hath received some advancement, not from his father, but from his grandfather; whether or no such grandchild shall bring his said advancement into hotchpot with the brothers and sisters of his father deceased. The grandchild in this case taketh not in his own right, but as representative of his father; and therefore, as it seemeth, shall not bring his own portion, but only his father's portion, into hotchpot.—But concerning these points, no adjudication hath occurred.

By portion not equal to the share which will be due to the other children] A child partly advanced shall bring in its advancement only amongst the other

other children ; but the wife shall have no advantage of it. *H. 1701. Ward and Lant. Prec. Cha. 182. 184.*

To every of the next of kindred to the intestate, who are in equal degree] Here it is very material to inquire, who are these *next of kindred in equal degree*. For the perfect understanding whereof, it is to be observed, that kindred are distinguished either by the *right* line, or by the *collateral*: The *right* line is of parents and children, computing by *ascendents* and *descendents*: The *collateral* line is between brothers and sisters, and the rest of the kindred amongst themselves. *Ayl. Par. 327.*

And forasmuch as proximity between two persons proceeds either from this, that they are descended one from the other (which makes the connexion between ascendents and descendents), or from their being both descended of one and the same person (which makes that of collaterals); we judge therefore of the proximity between two persons, by the number of generations which make both the one and the other of the said connexions. And these generations are called *degrees*, by which we step from one person to another, in order to make the computation of their kindred, in the manner hereafter explained. *1 Strab. Dom. 631.*

Those of the right line are reckoned upwards, as parents; or downwards, as children: those of the collateral line are reckoned *ex transversa* or side-ways, as brothers and sisters, uncles and aunts, and such as are born from them. *Ayl. Par. 327.*

And there is no difference between the *civil* and *canon* law in the ascending and descending line; but every generation, whether ascending or descending constitutes a different degree: Thus the father of John is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second; his greatgrandfather and greatgrandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the *civil* and *canon*, as in the *common* law. *Blackst. Descents. 8.*

But there is a difference in reckoning the *collateral* line. Thus, if we would know in what degree of collateral kindred two persons stand according to the *civil* law; we must begin our reckoning from the one of them, by ascending to the person from whom both are branched, and then by descending to the other to whom we do count, and it will appear in what degree they are: For example, In brothers and sisters sons; take one of them, and ascend to his father, there is one degree; from the father to the grandfather, that is the second degree; then descend from the grandfather to his son, that is the third degree; then from his son to his son, that is the fourth degree. *1 Inst. 23.*

But by the *canon* law, there is another computation. For the canonists do ever begin from the stock, namely, from the person of whom they do descend, of whose distance the question is: For example, if the question be, In what degree the sons of two brothers stand by the canon law, we must begin from the grandfather, and descend to one son, that is one degree; then descend to his son, that is another degree; then descend again from the grandfather to his other son, that is one degree; then descend to his son, that is a second degree. So in what degree either of them

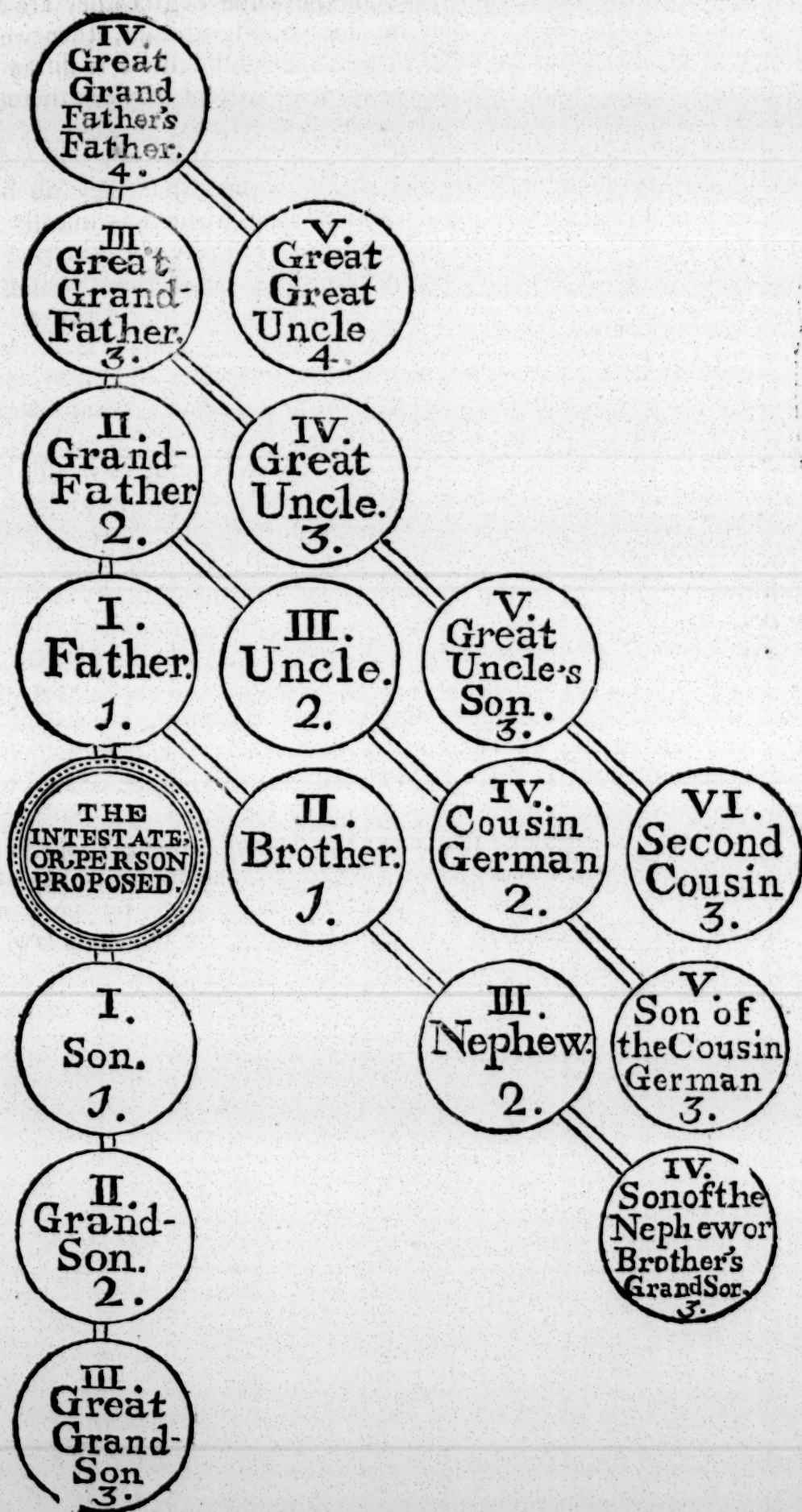
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are distant from the common stock, in the same degree they are distant between themselves. And if they be not equally distant, then we must observe another rule, viz. in what degree the most remote is distant from the common stock, in the same degree they are distant between themselves; and so the most remote makes the degree. 1 *Inst.* 24.

Collateral kinsmen agree with the lineal in this, that they descend from the same stock or ancestor; but they differ in this, that they do not descend from each other. Collateral kinsmen then are such as lineally spring from one and the same ancestor, who is the *stirps*, root, or common stock, from whence these relations are branched out. As if John has two sons, who have each a numerous issue; both these issues are lineally descended from John as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguinei*. Blackst. Desc. 9, 10.

And the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus John and his brother are related; why? because both are derived from one father: John and his first cousin are related; why? because both descend from the same grandfather: And his second cousin's claim to consanguinity is this, that they both are derived from one and the same greatgrandfather. In short, as many ancestors as a man hath, so many common stocks he hath, from which collateral kinsmen may be derived. And as we are taught by holy writ, that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is descended; the obvious and undeniable consequence is, that all men are in some degree related to each other. *Id.* 10, 11.

The different manner of calculating the degrees, may perhaps be better apprehended by the following table: Wherein it is to be observed, that the numeral roman letters at the top, express the degrees by the *civil* law; and the figures at the bottom, express the degrees by the *canon* law.



And here it is evident, that the degrees in the *descending* and *ascending* lines are by both laws the same. Thus the son is in the first degree, the grandson in the second, and the greatgrandson in the third, by both laws, in the *descending* line. So the father is in the first degree, the grandfather in the second, and the greatgrandfather in the third, and so on, by both laws, in the *ascending* line.

But in the *collateral* line the calculation is different. Thus the cousin german is in the fourth degree by the civil law, and in the second degree by the canon law. For by the civil law, we ascend first to the father, which is one degree; from him to the common ancestor the grandfather, which is the second degree; from the grandfather we descend to the uncle, which is the third degree; and from the uncle to the cousin german, which is the fourth degree. But by the canon law, we begin at the common ancestor the grandfather, and reckon downwards from him to the father, which is one degree; from the father to the intestate is the second degree: so, on the other side, from the grandfather to the uncle is the first degree; and from the uncle to the cousin german is the second degree: And by what degree they are distant from the common ancestor, by the same degree they are distant from each other, that is, in the second canonical degree.—So in reckoning to the son of the nephew, or brother's grandson: By the civil law, we ascend to the father, which is one degree; from the father we descend to the brother, which is the second degree; from the brother to the nephew, which is the third degree; and from the nephew to the son of the nephew, which is the fourth degree. But by the canon law, we begin at the common ancestor the father, and reckon down from him to the intestate, which is one degree: Then, on the other side, from the same common ancestor the father to the brother is one degree; from the brother to the nephew is the second degree; and from the nephew to the son of the nephew is the third degree: And by the rule before laid down, in what degree the further of them is distant from the common ancestor, in the same degree they are distant from each other; so that here the intestate and the son of his nephew, or brother's grandson, are distant by the canon law in the third degree of kindred.

And the reason of the different methods of computing the degrees of consanguinity in the collateral line, between the civil law on the one hand, and the canon law on the other, seemeth to be this: The civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed; it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him, and makes not only the son of his nephew, but also his cousin german, to be both related to him in the fourth degree, because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages, between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him; so that the son of

the nephew is related in the third canonical degree to the person proposed, and the cousin german in the second; the former being distant three degrees from the common ancestor, and therefore deriving only one fourth of his blood from the same fountain with the person proposed; the latter, and also the person proposed, being each of them distant only two degrees from the common ancestor, and therefore having one half of each of their bloods the same. *Blackst. Desc. 41, 42.*

For persons descended from one common ancestor, in the first degree, have the whole blood of their said common ancestor; in the second degree, they have but half the blood of the said common ancestor; in the third degree, they have but half of that half, that is, one fourth; in the fourth degree, only half of that fourth, that is, one eighth; in the fifth degree, one sixteenth; and so on in infinitum.

The common law regards consanguinity principally with respect to descents; and having therein the same object in view as the civil, it may seem as if it ought to proceed according to the civil computation. But as it also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore counts its degrees in the same manner. Indeed the designation of person, in seeking for the *next of kin*, will come to exactly the same end (tho' the degrees will be differently numbered) which ever method of computation we suppose the law of England to use; since the right of representation in the descent of real estates (of the father by the son, and so on) is allowed to prevail in infinitum. This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degrees of kindred, as (for instance) uncles and nephews of the deceased; which multiplicity, tho' no inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion, where the right of sole succession, as with us, is established. The issue or descendants therefore of the brother of John, are all of them in the first degree of kindred, with respect to inheritances, as their father when living was; those of his uncle in the second; and so on; and are called to the succession in right of such their representative proximity.

The right of representation being thus established, the rule with regard to the descent of real estates amounts to this; that, on failure of issue of the person last seized, the inheritance shall descend to the issue of his next immediate ancestor. Thus if John dies without issue, his estate shall descend to his brother, who is lineally descended from his next immediate ancestor, their father. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of John, the lineal descendent of their common ancestor, the grandfather; and so on. *Blackst. Ibid.*

But this representation in infinitum amongst collaterals, is not admitted in the succession to personal estate, the same being restrained and limited by the statute, (as will appear afterwards).

In the case of *Wingate and Fitch, M. 21 Ja.* Administration upon the statute of Hen 8, was granted to the brother of the half blood. The brother

brother of the whole blood appealed to the delegates, alledging that he was nearer of kin by the ecclesiastical law; and the delegates inclining to repeal the administration, and to grant it to the brother of the whole blood, a prohibition was granted to try the matter thereupon by the common law: for this being ordained by statute, it was said, that it ought to be interpreted according to the common law. 2 *Roll's Abr.* 303.

And in the case of *Blackborough* and *Davis*, *E. 13 W.* Holt chief justice said, that the construction of the statute of distribution, on the proximity of degrees, must be according to the common law. 12 *Mod.* 616.

But the more modern cases seem to suppose, that the said statute, being made in an ecclesiastical matter, shall be construed according to the rules of the civil law.

Upon which account, the learned Dr. Harris observes, that the three first chapters of the 118th Novel of Justinian, deserve the reader's attentive consideration; not only because they contain the latest policy of the civil law, in regard to the disposition of intestate estates; but because they are the foundation of our statute law in this respect. And they are still (he says) almost of continual use, by being the general guide of the courts in England, which hold cognizance of distributions, in all those cases, concerning which our own laws have been either silent, or not sufficiently express. *Harr. Justin. ad finem.*

And therefore it is judged requisite to insert the said three chapters here at length, and in the progress to observe what alterations have been made by the statute aforesaid, and by the other laws of this realm, and how far the said Novel with respect to this matter seemeth to be still a rule and direction.

CHAPTER THE FIRST.

Of the succession of DESCENDENTS.

“ IF a person dieth intestate, leaving a descendent of either
 “ sex, or of whatsoever degree; such descendent is to be pre-
 “ ferred to all ascendants and collaterals. And if any of the de-
 “ scendants of the deceased should die, leaving sons or daughters
 “ or other descendants, they shall succeed in the place of their
 “ parent, and shall be intitled to the same share of the intestate's
 “ estate, which their parent would have had if such parent had
 “ lived. And this kind of succession is termed a succession *in*
 “ *stirpes*; for in the succession of descendants we allow no priority
 “ of degree, but admit the grandchildren of any person by a
 “ deceased son or daughter to be called to inherit that person to-
 “ gether

“ gether with his sons or daughters, without making any distinction between males and females, or the descendants of males and females.”

And what the civil law distributes in this manner amongst the children and other descendants, the statute clearly enough apportioneth amongst them, taking in together with them the wife of the deceased where there is a wife surviving. And herein the civil, canon, common, and statute laws do all agree, in giving this preference to descendants, exclusive of all ascendants and collaterals.

Only with respect to *grandchildren*, these by the civil law, even when alone, altho' they descend from various stocks, and are unequal in their numbers, will take the estate of their deceased grandfather *per stirpes*, and not *per capita*; as suppose a man should die, leaving grandchildren by three different sons, already dead, to wit, three by one son, six by another, and twelve by another, each of these classes of grandchildren would take a third of the estate, without any regard to the inequality of the numbers in each class. But as to this point in England, the courts in which distributions are cognizable, will order the division of an estate in such case to be made *per capita*; and this, partly from a motive of equity, and partly from a consideration of the intent of the statute, which directs an equal and just distribution: and when the act mentions representation, it must be understood to refer to it, in those cases only, where representation is necessary to prevent exclusion, but not to refer to it in those cases, where all the claimants are in equal degree, and therefore can take each in his own right. *Harr. Just. ibid.*

And if in the case of the succession of a father, who leaves behind him one or more children, his widow should happen to be big with child, the child in the mother's womb would be reckoned among the children of the deceased. And if the other children should proceed to a partition of the estate, it would be necessary to lay aside one share for the child that is to be born, and to name a curator to it, who may take care of its interest; unless they should think it more convenient to delay the partition until the birth of the child, either by reason of the uncertainty whether the child will be born alive or not, or because it may happen that there may be more children than one of this birth. *1 Strab. Dom. 624.*

But this provision is rendered more effectual by the statute aforesaid, which requires that no distribution shall be made till after the expiration of one year from the intestate's death, within which time such child or children will be born.

CHAPTER THE SECOND.

Of the succession of ASCENDENTS.

“ **W**HEN the deceased leaves no descendents, if a father
 “ or mother or other ascendent survive him, we decree,
 “ that they shall be preferred to all collateral relations; except
 “ brothers or sisters, as shall be hereafter more particularly de-
 “ clared. And if divers ascendents are living, we prefer those
 “ who are in the nearest degree, whether they are male or fe-
 “ male, paternal or maternal. And when several ascendents con-
 “ cur in the same degree, the inheritance of the deceased must
 “ be so divided, that the ascendents on the part of the father may
 “ receive one half, and the ascendents on the part of the mother
 “ the other half, without regard to the number of persons on
 “ either side. But if the deceased leaves brothers or sisters of the
 “ whole blood, together with ascendents, these collaterals of the
 “ deceased shall be called with the nearest ascendents; and al-
 “ tho’ the surviving parents are a father and mother, the inheri-
 “ tance must be so divided according to the number of persons,
 “ that each of the ascendents, and each of the brothers and sisters,
 “ may have an equal portion.”

If a father or mother] By the law of England, when a child dieth intestate leaving a *father*; the father is solely intitled to the whole personal estate of the intestate, exclusive of all others; and anciently, that is, in the reign of king Henry the first, a surviving *father*, or *mother*, could have taken even the real estate of their deceased child. But this law of succession was altered soon afterwards; for we find by Glanville, that in the time of king Henry the second, a father or mother could not have taken the real estate of their deceased children, the inheritance being then carried over to the collateral line. And it hath ever since been held as an inviolable maxim, that an inheritance cannot ascend. But this alteration in the law made since the reign of king Henry the first, did not extend to personal estate; so that before the statute of the 1 *Ja.* 2. c. 17. if a child had died intestate, without a wife, child, or father, the *mother* would have been intitled to the whole personal estate; but by that statute, every brother and sister, and their representatives, shall have an equal share with her. *Harr. Just. ibid.*

Or other ascendent] Here it is manifest by the civil law, that ascendents, of whatever degree, shall be preferred before all collaterals (except in the case of brothers and sisters as aforesaid). But by Holt chief justice, in the case of *Blackborough* and *Davis*, it was holden, that
 this

this is altered by the statute ; which prefers the next of kin tho' collaterals, before one tho' lineal that is more remote. 1 *P. Will.* 51.

In the said case of *Blackborough* and *Davis*, *E. 13 W.* Administration being granted to the grandmother, the aunt moved for a mandamus to have it granted to her, urging that the first administration was void, she being nearer in degree. But by Holt chief justice: In such case it is not void, but only voidable ; and it is a matter properly contestible in the spiritual court. And if they are in equal degree, the spiritual court hath election. And the grandmother is as near as the aunt, because the descent to either would be a mediate descent, the medium of which is the father. But the court thought the advantage on the grandmother's side, in this respect, that she stands in the right line. Afterwards the aunt moved for a mandamus to have *distribution*, being in equal degree. On the contrary, it was argued, that she was not intitled to it, being not so near as the grandmother, for the grandmother stands in the place of the mother, and is in the second degree to the intestate ; the aunts are the daughters of the grandmother, and the daughters cannot be in equal degree with their mother. And by Holt chief justice ; No mandamus ought to be in this case. And he said, as by the common law, father and mother were nearer than brother and sister, so grandfather and grandmother are nearer than uncle and aunt. And the grandmother in this case is the root of the kindred, whereas the aunt is only a branch. 1 *Salk.* 38. 351. *Prec. Cha.* 527. 12 *Mod.* 623. 1 *P. Will.* 51. *L. Raym.* 684.

So in the case of *Woodroffe* and *Wickworth*, in the court of chancery, 7. 1719, it was clearly agreed, that if one dies intestate, leaving a grandmother and uncles and aunts ; the grandmother is intitled to the personal estate, in exclusion of the uncles and aunts. *Prec. Cha.* 527.

If divers ascendants are living, we prefer those who are in the nearest degree, whether they are male or female, paternal or maternal] And conformable hereunto are the words of the statute, that in such case the distribution shall be made amongst the next of kindred who are in equal degree. So in the case of *Moor* and *Barkham*, May 13, 1723. where the next of kindred to the intestate were a grandfather by the father's side, and a grandmother by the mother's side ; it was decreed, that they shall take in equal moieties, as being in equal degree ; for tho' the grandfather by the father's side may in some respects be more worthy of blood (as in case of the descent of lands) ; yet in this respect, dignity of blood is not material. 1 *P. Will.* 53.

And when several ascendants concur in the same degree, the inheritance of the deceased must be so divided, that the ascendants on the part of the father may receive one half, and the ascendants on the part of the mother the other half, without regard to the number of persons on either side] By the custom of France (Mr. Domat tells us), in pursuance of the rule *paterna paternis, materna maternis*, the remotest ascendants are preferred to those that are nearer, with respect to the goods descended from their stock. And this, he says, seemeth to

be more equitable and natural; and there seemeth even to be something of a hardship in the contrary rule. 1 *Strab. Dom.* 639.

And with us, in respect of the descent of lands, the rule holdeth, that lands which came by the father shall descend to the heirs on the part of the father, and the lands which came by the mother shall descend to the heirs on the part of the mother. But with respect to the distribution of personal estate, the statute requires an equal distribution amongst all such ascendants as are in equal degree.

If the deceased leaves brothers and sisters — together with ascendants, these collaterals of the deceased shall be called with the nearest ascendants] If it should here be asked, whether the brother of an intestate would exclude the grandfather by the civil law; the novel appears at first sight to answer it very fully in the negative, by enacting, that if the deceased leaves brothers and sisters, together with ascendants in the right line, these collaterals shall be called with the nearest ascendants. And the generality of writers have understood this passage, as admitting ascendants and brothers to take jointly: Yet a contrary interpretation hath been given by some civilians, and for this, amongst other reasons, that as a benefit is hereby intended to the brothers and sisters, this benefit to them would be so much the less, as the ascendants are farther distant from the person deceased, whereas on the contrary in reason it ought to be so much the more. As for example; suppose there are two brothers, and a father and mother, in this case each brother would receive a fourth part; but if there be no father or mother, it may happen that there shall be four grandfathers and grandmothers, and then each brother would have but a sixth part; so there may be eight greatgrandfathers and greatgrandmothers, in which case each brother would receive but a tenth part; and so on.—But this question seems now to be settled in England, in consequence of three determinations; the first of which was given in the exchequer, in the case of *Poole and Wilshaw*, T. 1708; the second, in the case of *Norbury and Vicars*, before Fortescue, master of the rolls, M. 1749; and the third was delivered by the lord chancellor Hardwicke, in the case of *Evelyn and Evelyn*, H. 1754. *Harr. Justin.* *ibid.*

Which case of *Evelyn and Evelyn* was this.—By the lord chancellor *Hardwicke*: This case is between the grandfather and the brother of the deceased. It is insisted on the behalf of the grandfather, that he is in equal degree of consanguinity with the brother of the deceased, and intitled to an equal share of his estate under the statute of distribution. The statute says, that the ordinary (in case there shall be no wife, children, or childrens children) shall make a just and equal distribution among the next of kindred to the dead person in equal degree, or legally representing their stocks pro suo cuique jure, “according to the laws in such cases, and the rules and limitations hereafter set down.” Which limitation is only a particular specification in what cases representation shall be allowed; and there is nothing more expressed

pressed in the statute, than that the estate shall be distributed equally to every the next of kin to the intestate, who are in equal degree.

This point has been already twice determined in courts of equity. First, in the case of *Poole* and *Wilshaw*; and afterwards in the case of *Norbury* and *Vicars*.

But it has been insisted on for the grandfather, that both these decrees are erroneous; and that according to the computation by the civil law, the grandfather and brother are in equal degree, and consequently are equally intitled.

And I do agree, that in this case the computation of degrees ought to be according to the rules of the civil law; and that those of the common law are only to be regarded in matrimonial cases. Notwithstanding which, I shall adhere to the determination of the case of *Poole* and *Wilshaw*. I have seen the lord chief baron Ward's, and Mr. baron Price's reports of this case, and also that of Mr. Dodd (afterwards chief baron). The last of which, tho' but short, is the clearest of the three. It was a bill brought by the grandmother, for a share of her grandson's estate equally with his brother. And it was insisted on for her, that she was in equal degree of consanguinity, and equally intitled. But the reporter says, "All the court contrary; and there has been no such usage since the making the statute." And I know of none since; tho' it is 83 years since that statute was made. The subsequent decree at the rolls was conformable to this. And therefore I shall not attempt to overthrow these determinations.

But if this was *res integra*, I think there are strong grounds both from the common and civil law, to prefer the brother to the grandfather. The words in the statute "*pro suo cuique jure*, according to the laws in such cases," refer to certain precedent rules and methods of expounding the law.

The civil law is no part of the laws of England, any further than it has been received here in certain cases. In descent of lands there is but one degree between brother and brother. See lord chief justice Hale's argument in the case of *Collingwood* and *Pace*, 1 *Ventr.* 423. who says, that according to the computation of degrees according to the laws of England, brother and brother makes one degree. And the brother is distant from his brother and sister in the first degree of consanguinity. And he adds, that tho' the brother is by the civil law in the second degree from the brother, yet they say, in collaterals *nullus est proximior fratre, ideoque in collateralibus nullus est primus gradus, sed secundus obtinet vicem primi*. In the case of *Blackborough* and *Davis*, 1 *P. Will.* 50. the lord chief justice Holt delivered the opinion of the court, and said, that the laws of England, and not any foreign law, ought to govern in this case, and he cited the Saxon laws and others to the point then in question, which was concerning a personal estate.

What I have said would, I think, alone be sufficient to support the determination in the case of *Poole* and *Wilshaw*; as it shews, that the construction of the statute ought to be according to the law of England. But I further think, that according to the Roman law alone, there would

be sufficient ground to support the resolution. How the matter of succession of collaterals stood upon the law of the twelve tables, and what alteration it received by the constitution of the emperor Claudius, and the *senatus-consultum Tertullianum* made in the time of the emperor Antoninus Pius the adopted son of Adrian, so as to let in the mother who was before excluded, may be seen at large in Vinnius's commentary on the Institutes *. By the text itself of the Institutes †, it appears, that the grandmother was not to take as well as the mother. The words are, *Postea autem senatus-consulto Tertulliano, quod divi Adriani temporibus factum est, plenissime de tristi successione matris non etiam aviæ deferendum, cautum est.* See Vinnius's comment on this passage, page 543, who shews that it was in the time of Antoninus Pius. But Heinecius's Syntagma, lib. 3. tit. 3. examines all the arguments, and inclines to Justinian's opinion. By the Code ‡, the sister is preferred with the grandmother or grandfather.

But the whole has been altered by the Novels of Justinian.—It has been said, that the Novels were never received in the western empire. But this is not so in the generality in which it was laid down. For they have been received in all countries where the civil law has been received, as much as other parts of that law; which has never, since the declension of the western empire, been taken for the absolute rule of law in any nation. All the commentators on the civil law, consider the Novels as part of the Roman law. They call them *jus novissimum*. Vinnius, in his commentary on the Institutes §, has a dissertation which he calls *ratio succedendi ab intestato ex jure novissimo*. Now by the 118th Novel, the brothers are let in to take an equal share with the father and mother. It is true that Mr. Domat is of another opinion ||. But Voet maintains the former opinion with great clearness: *Illud non satis expeditum est, &c ***. In this passage Mr. Voet shews, that the emperor in the above cited Novel has emphatically said, *fratres et sorores cum proximis gradu ascendentibus vocari*; which mention of the *next in degree* would be intirely superfluous, if it was not intended to denote those who are in the first ascending degree; since it is a certain rule of law, that there is no representation in the ascending line. He afterwards shews what absurdities follow, by letting in remoter persons in the ascending line to share with the brothers; since the more remote they were, the more in number they might be, and consequently would carry away a great share from the brothers, as the estate is to be divided into as many portions as there are persons. He then argues from the words of the Novel, which says, that the brothers shall be called to succeed equally with the ascendants in the next degree (See the critique on these words, in Domat before cited)—*Si aut pater aut mater fuerint*. Whence it follows, that they are not to come in promiscuously with all ascendants, but *Si pater aut mater fuerint*. And he gives some additional reasons to support his opinion. *Si aut pater*—these are the words

* Lib. 3. tit. 2. par. 3.

† Lib. 3. tit. 3. par. 2.

‡ Lib. 6. tit. 58. l. 9.

§ 4to edition at Leyden, 1726. pa. 554.

|| Folio edition at Paris, 1713. Vol. 1st.

Part. 2d. Book 2d. Tit. 2d. Sect. 1. Paragr. 7th. Or Strahan's Translation 2d edition, page 639.

** Hague edition 1731. Vol. 1st. Book 38th. Tit. 17. Paragr. 13. page 587.

of the Novel as cited by Voet ; but in the Novel itself it is *Si et pater* (εἰ καὶ πατὴρ ἢ μητὴρ εἰσὶν). Upon which Mr. Domat argues, that the words *si et*, being translated from the Greek, signify *et si*. However Mr. Voet's general reasoning may be preferred to Domat's, it is not fair in him to alter the words of the Novel, on purpose to favour his own interpretation ; when he could not but know, that a contrary one had been founded on the words as they stand in the Novel.

The lord chief justice Hale in the place above cited (1 Ventr. 423.) says, that the brothers is the first degree in collaterals. And the text of the Institute * says, *superior quidem et inferior cognatio a primo gradu incipit ; at ea, quæ transversæ numeratur, a secundo.*

Vinnius, who is a very acute commentator, in the *ratio succedendi ex jure novissimo* above cited, has an argument to prove, that the right of succeeding is not always according to the proximity of degrees. In which (p. 556.) are these words, *Concludo igitur fieri posse, ut aliqui, pari gradu constituti jure proximitatis, soli succedant, exclusis iis qui eodem gradu aut etiam propinquiore sunt, si illorum jus sit potius.* This shews, that one person may be preferred to another in equal degree, *si ejus jus sit potius.*

In the present case—*Ipsa utilitas, justè prope mater et aequi*, inclines to the preferring the brother to the grandfather ; since there is in young persons a natural *spes accrescendi*. This alone indeed would not be sufficient to ground a determination upon ; but, joined to other reasons, it has its weight. And since not only the reasons are on this side the question, but the determinations have been that way, and to overthrow them would tend to introduce inconveniencies, as it might disturb distributions already made, which is an argument of the greatest weight in the law, I shall determine this point in favour of the brother, to the exclusion of the grandfather.

CHAPTER THE THIRD.

Of the succession of COLLATERALS.

“ IF a person leaves neither descendents nor ascendents at the
 “ time of his death, we first call his brothers and sisters of the
 “ whole blood, whom we have also called to inherit with the fa-
 “ thers of deceased persons. And when there are no brothers of
 “ the whole blood with the deceased, we call those, who are ei-
 “ ther by the same father only, or by the same mother. And if
 “ the deceased leaves brothers, and also nephews by a deceased
 “ brother or sister ; those nephews shall be called to succeed with
 “ their uncles and aunts of the whole blood to the deceased : but
 “ however numerous those nephews are, they shall be intitled
 “ only to that share, which their parent would have taken, if

* Book 3d. Tit. 6th. Part. 1st.

“ alive. From whence it follows, that if a man dies, and is sur-
 “ vived by the children of a deceased brother of the whole blood,
 “ and also by brothers of the half blood, then his nephews (that
 “ is, the children of his brother by the whole blood) are to be
 “ preferred to their uncles and aunts; for altho’ such nephews are
 “ themselves in the third degree, yet they are preferred, as their
 “ parent would have been, if living. And on the contrary, if a
 “ man dies, and is survived by a brother of the whole blood, and
 “ by children of a brother of the half blood deceased, these ne-
 “ phews are excluded, as their father would have been, if he had
 “ lived. But among collaterals, we allow the privilege of repre-
 “ sentation to the sons and daughters of brothers and sisters, and
 “ no farther; and we grant it only to brothers and sisters children,
 “ when they concur with their uncles or aunts, paternal or ma-
 “ ternal: for when ascendants are called to inherit, we by no
 “ means permit the children of a deceased brother or sister to
 “ share in the succession; altho’ the father or mother was of the
 “ whole blood with the deceased brother. But we have so far al-
 “ lowed the right of representation to brothers and sisters children,
 “ that being only in the third degree, they are called to inherit
 “ with those who are in the second: And this is evident, because
 “ brothers and sisters children are preferred to the uncles and
 “ aunts of the deceased, paternal as well as maternal; altho’
 “ they are all in the third degree of cognation.—But if a deceased
 “ person leaves neither brothers nor sisters, nor brothers nor sisters
 “ children; we then call all the other collaterals, according to
 “ the prerogative of their respective degrees, preferring the nearer
 “ to the more remote; and if several are found in the same de-
 “ gree, the inheritance must be divided according to the number
 “ of persons. And this manner of dividing an inheritance is called
 “ a division *in capita*.” Harr. Justin. *ibid*.

Of the whole blood] We must here observe in relation to the
 distinction between the whole blood and the half blood, that the law of
 England is different in this particular, according as the succession regards
 lands of inheritance, or personal estate. In the case of inheritances, the
 whole blood is always preferred, and the half blood is no blood inheritable
 by descent. In succession to personal estate, the law hath been more un-
 certain; inasmuch as the statute takes no notice of this distinction between
 the whole blood and the half blood, but directs the distribution to be made
 amongst the next of kindred in equal degree to the intestate. But it being
 certain that brothers and sisters of the half blood are in the same degree
 with brothers and sisters of the whole blood, it hath been the general
 opinion, that according to the said statute, brothers and sisters of the half
 blood are intitled to an equal share of the intestate’s estate, with the bro-
 thers

thers and sisters of the whole blood; altho' there are several precedents of judgments given, since the statute, allowing the half blood to have but an half share. But the law in this particular is now become fixed and certain, ever since the decree of the house of lords, in the case of *Watts* and *Crooke*, upon an appeal from a decree in chancery, which had been given in favour of the half blood, and which was affirmed by the house of lords. 1 *Strab. Domat.* 658.

If the deceased leaves brothers and also nephews] In the case of *Walsh* and *Walsh*, *M.* 1695. A man had three brothers; one of them died, leaving three children; another died, leaving two; and the third died, leaving five children; after which, he himself died intestate. It was resolved, that distribution should be *per capita*, and not *per stirpes*; and that all the children should have equal: because none of them take by way of representation, but all as next of kindred in equal degree. *Prec. Cha.* 54.

So in the case of *Janson* and *Bury*, *H.* 1723. Lord chief baron Bury had several brothers and sisters, some of the half, and some of the whole blood, who all died in his life time, all leaving several children. And now upon a bill exhibited for the distribution of his estate, it was decreed by the whole court of exchequer, that the distribution should be *per capita*, and not *per stirpes*; for now they do not take by representation, but as next of kin to the intestate. But if one of the brothers or sisters of the chief baron had survived him, the children of the rest must have taken only by representation, that is to say, *per stirpes*. And the case in this court, between *Wall* and *Theedham*, was cited, which was on Jun. 28, 1711. Dr. Wall, the intestate, had two sisters; Susanna, of the half blood, who left Samuel; Elizabeth, of the whole blood, who left John, Mary, and Dorothy. Both the sisters died in the life time of Dr. Wall. His wife, as administratrix, preferred a bill for direction in the distribution; and the court decreed one moiety of the intestate's estate to the wife; and the other moiety to be divided into four parts, one part for the issue of Susanna, and three for the issue of Elizabeth. And no distinction was made, between the whole and the half blood. *Bunb.* 157.—And so much for the 118th Novel of Justinian. We now proceed with the explanation of the other parts of the statute of distribution, and of the other statutes consequent thereupon.

No representatives admitted among collaterals, after brother's and sister's children] In the case of *Maw* and *Harding*, *T.* 1691: The question was, Whether these words of the statute are to be intended of brothers and sisters to the intestate; or whether, when distribution falls out amongst brothers and sisters, tho' remote relations to the intestate, representation shall be admitted amongst them. And the court held, that the representation should be only between the brothers and sisters to the intestate. 2 *Vern.* 233.

In the case of *Pett* and *Pett*, *T.* 1700. The persons claiming distribution were a deceased brother's daughter, and the grandchildren of another deceased brother. And it was held by the court, that the deceased brother's daughter only was intitled; and that a deceased brother's or sister's grand-

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grandchildren shall not come in with a deceased brother's or sister's children. 1 *P. Will.* 25. 1 *Salk.* 250.

So in the case of *Bowers* and *Littlewood*, *M.* 1719. A man died intestate, leaving no wife or child, brother or sister, but his next of kin were an uncle by his mother's side, and a deceased aunt's child. The latter brought a bill against the uncle for a share of the intestate's estate. To which the defendant demurred; and the demurrer was allowed. And the lord chancellor said, that the case of *Pett* and *Pett* was in point; and that what had been urged in regard to the hardship of the case, was nothing; for so it may seem hard, that if an intestate leaves a deceased brother's only son, and ten children of a deceased half sister, the ten children shall take ten parts in eleven with the son of the deceased brother, and yet the law is so, because they all take per capita, and not by way of representation. 1 *P. Will.* 594.

That no such distribution of the goods of any person dying intestate be made till after one year] But the right to the distributive share vests immediately on the intestate's death. As in the case of *Grice* and *Grice*, *H.* 1708. Where a person, intitled to a distributory share of an intestate's estate, died within a year after the intestate, it was decreed, that altho' by the statute no distribution is to be made within a year, yet the share of the deceased person is an interest vested, transmissible to his executors or administrators; for in this sense the statute makes a will for the intestate, and it is as if a legacy was bequeathed, payable a year hence; which would plainly be an interest vested presently. Nay, where one died without wife or issue, and intestate, leaving a father, who also died before taking out administration, or altering the property of the estate; yet by the statute the right to the intestate's personal estate vested in the father, and consequently belonged to his executors or administrators, and not to the next of kin to the first intestate, who in this case happened to be a different person. 3 *P. Will.* 49.

Husbands may demand and have administration] By this explanatory act of the 29 C. 2. the right of husbands is saved, of administering to their wives rights, credits and other personal estates.—In the case of *Cary* and *Taylor*, *M.* 1693. The wife intitled by the statute of distribution, died before any distribution was made, and the husband died soon after without taking administration to his wife: It was decreed, that the wife's share should go to the husband's administrator, and not to the administrator of the wife. 2 *Vern.* 302.

M. 1718. *Squib* and *Wynne*. A wife intitled by the death of her sister, to a personal estate consisting of things in action, died; her husband married again, and died intestate, without having taken administration to his first wife. The second wife took out administration to him, and also to the first wife of the goods not administered by the husband. And it was decreed, that the first wife's share of her sister's personal estate, should go to the administratrix of the husband. And the lord chancellor Cowper said, that the exception in the statute of the 29 C. 2. doth not confine it to the life of the husband, or to the circumstance of his having reduced any part of the wife's personal estate into possession, but provides that no

part

part of her estate shall be distributed among her relations after her. 1 P. Will. 378.

M. 1718. *Cart and Reeves*. A wife died possessed of things in action. The husband survived, and died, without taking out letters of administration to his wife. After which, the next of kin to the wife administered to her. And the lord chancellor Macclesfield held, that the wife's administrator was but a trustee for the executor of the husband. And he said, that this clause in the act was made in favour of the husband, and not to his prejudice; so that it was intended by the parliament, that the husband should be within the statute of distribution so as to take the wife's things in action as to his benefit, but should not be within the same as to his prejudice; for were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next of kin, tho' ever so remote, which was not the intent of the statute. 1 P. Will. 381. And the reporter adds, that Mr. Vernon cited the case of lady *Aiscough*, wherein he said, lord Cowper's opinion was the same with lord Macclesfield's, that the wife's things in action did vest in the husband by the statute of distribution; so that since this resolution, the right of administration follows the right of the estate, and ought, in case of the husband's death after the wife, to be granted to the next of kin to the husband, in the same manner as it is granted to a residuary legatee. *Id.* 382.

For if a husband survive his wife, all interest vested in her belong to him; and altho' he dies without getting them in, or taking out administration to her, yet they belong to his representatives, and not to her's. 2 Abr. Eq. Cas. 424.

So in the case of *Humphreys and Bullen*, T. 1737. The wife had a legacy left her by her husband; and after married a second husband, and died. Her second husband took out administration to her, but died before he received the legacy. His next of kin took out administration to him, and received the legacy. Another person took out administration to the wife of the goods not administered, and brought a bill against the husband's administrator to repay the money. The question was, whether it belonged to the plaintiff in that right, or to the defendant as representative of the husband. The lord chancellor *Hardwicke* thought it so clear for the defendant, that he would not suffer it to be argued. He said; This is a plain case, taking it as it stood on the old statutes of administration, for thereby the husband was intitled to administration if he survived his wife. And as it stood on these statutes, no body could call him to an account for the effects, for the party was to administer for the good of the soul, but not to make a distribution. But by the 22 & 23 C. 2. c. 10. administrators are liable to make distribution, one third to the wife of the intestate, and so on. Yet upon the penning of that statute, tho' no notice was taken of the husband being administrator of his wife, it was held not to be within the act; for no person could be in equal degree to the wife with the husband, and so he was not subject to the statute of distribution. Which matter is explained by the 29 C. 2. c. 3. s. 25. which says, the husband may demand administration of his deceased wife's personal estate, and recover and enjoy the same, as he might have done

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before that act, which was (before that act) as his own property. And if before the statute of distribution, the husband had died before he had called in the effects of his wife, and any other person had taken out administration to the wife, he would have been a trustee for the husband. So in the case of *Cart* and *Reeves* in lord Macclesfield's time, it was held, that an administrator *de bonis non* of the wife was a trustee for the representative of the husband. Therefore, tho' in point of law the plaintiff may be representative of the wife, yet he is only a trustee for the next of kin to the husband; and then the plaintiff, by bringing this bill against the person for whom he is intrusted, has been guilty of a breach of trust; so his bill must be dismissed, with costs. 2 *Abr. Cas. Eq.* 445.

Shall die intestate without wife or child, in the life time of the mother] Before this statute of the 1 *J. 2. c. 17.* If one died without wife or child, his mother had all, and his sisters and brothers nothing; as the father surviving hath all at this day. And the reason of making this statute was, because the mother might marry, and carry all away to another husband. 1 *Salk.* 251.

But if there be no brother or sister, or representative of brother or sister, then it is out of the statute, and the mother shall have the whole, as she had before the making of it. As in the case of *Jackson* and *Proudehome*, *T. 2 G.* The son died intestate, without father, brother, or sister; his mother living. She makes her will, and therein makes an executor and residuary legatee; and dies within a week after her son, and without having taken administration to him. The brother of the mother takes out administration to the son, as his uncle and next friend. The mother's executor brings a bill against the uncle who was the son's administrator, to have an account of the personal estate of the son in right of his testatrix, who was intitled to it by the statute of distribution. Lord chancellor Cowper said, that the administrator of the son is only trustee for the next of kin to the intestate who are intitled to a distribution by the statute, and that in this case was the mother, the son dying without father brother or sister; and it is an interest vested in the mother, tho' she died before administration taken out to the son, and shall go to her executor and residuary legatee: And decreed accordingly. *Viner. Execut. (Z. 12.)* 1.

Without wife or child] *T. 12 G. 2. Keilway and Keilway.* R. Keilway died intestate possessed of a considerable personal estate, and without issue, leaving a wife and several brothers and sisters, and his mother living. The wife under the statute of *C. 2.* takes a moiety; and a question arising upon the statute of *J. 2.* how the other moiety should be distributed, whether the mother should have the whole, or only a distributive share with the brothers and sisters, a bill was brought in order to have the opinion of the court. Upon hearing, the lord chancellor King was clearly of opinion, and decreed, that the mother should have no more than a share of the other moiety with the brothers and sisters of the intestate; for the intent of the statute was, to put the mother (who before stood upon the same footing with the father) in the same state and condition only with these collaterals; so that whenever she is intitled, they shall have an equal share with her. *Str.* 710.

And

And this case was affirmed to be law, by the lord chancellor Hardwicke, in the case of *Stanley and Stanley*, May 15. 1739. 2 *P. Will.* 347. *Every brother and sister*] Jan. 24. 1740. *Wallis and Hodson*. James Wallis died intestate, leaving a wife ensient with a daughter, and one son Towers Wallis. Towers Wallis died soon after his father, and then the mother was delivered of a daughter. A bill was brought by the daughter for a moiety of the personal estate of Towers Wallis. A cross bill was filed by the mother, praying that the whole personal estate of Towers Wallis might be decreed unto her. At the hearing of this cause, lord chancellor Hardwicke thought it was a matter of some difficulty, and directed it to stand over till he had consulted with the civilians upon it; and now delivered his opinion: That the daughter, born after the death of her brother, was intitled to a moiety of his personal estate. This is a question which depends upon the statute 1 *J. 2. c.* 17. If the sister had happened to have been born before the death of her brother, without doubt she would have been intitled to a share of her brother's personal estate equally with her mother. The only doubt is, inasmuch as she was a posthumous sister, and born after the death of her brother. But that circumstance, I am of opinion, will make no difference. It was admitted by the counsel for the defendant, that upon the statute of *Cha. 2.* a posthumous child shall have the benefit of a share of the personal estate of his father, equally with the other children; for this is agreeable to the intent of that statute, and to that debt of nature which parents owe to their children: Nor can any inconvenience arise from this; because the event of there being such children, must happen in nine months at furthest. But it was objected, that in collateral successions *ab intestato*, as between brothers and sisters, uncles and nephews, there is no such debt of nature: That the distributary share must vest in the party at the time of the death of the intestate, or not at all; and that great inconveniencies must follow from a different determination; and that the vesting might be postponed, and broken in upon, and varied by a subsequent event: And in order to specify an inconvenience of this sort that might happen, the case of the half blood has been put that they are equally intitled to a distributary share with the whole blood; that a mother might marry a second husband, and by that means there may be more brothers and sisters born at great distances of time, and therefore the distribution of the party's estate might perpetually vary. As to the first of these objections, that there is no debt of nature in collateral successions, that is a circumstance of no weight; for in the case of lineal successions, where that objection has been made use of as an argument for giving a share to the posthumous child, that has been only an additional corroboratory reason, and the primary reason has been the intention of the statute to preserve the estate of the father among his own children. As to the second objection, that the estate must vest immediately upon the death of the intestate; it is true, that this is generally laid down in 1 *Vern.* 403. and 2 *Vern.* 274. but this objection is of equal weight in the case of lineal successions *ab intestato*, as it is in collateral successions; yet there it has never been allowed: and this appears by the opinion of lord

Raymond, 2 *P. Will.* 446. *Edwards and Freeman.* As to the third objection, that according to this doctrine, a posthumous brother or sister of the half blood would be able to take, which would introduce many inconveniencies; it is very true, that on the statute of Charles the second, the half blood shall take equally with the whole; for that was finally settled in *Showers's parliamentary cases*, 108. where all the learning on this head is collected together; but I do not find, that it was ever determined on this statute of James the second, that a brother of the half blood should take as representative of his brother deceased. In the case of *Watts and Cowton*, this point was argued, and many probable reasons given for that side of the question; but there is no determination, and I will give no opinion upon it. The principal reason upon which I found my opinion in the present case is, that the posthumous sister was *in ventre sa mere* at the death of her brother, and consequently was a person *in rerum natura*. Upon this ground it is, that by the rules of the common and civil law, she is capable of taking in succession. By the rules of the common law, an ensient of this kind may be vouched in a common recovery; and in behalf of such an ensient, a bill may be brought, and an injunction granted to stay waste. So in the construction of wills and uses, an infant of this sort is capable of taking. For notwithstanding the case of *Siow and Cutler*, it is now settled, that such an infant is capable of taking by devise. And of this opinion were two judges, in the case of *Scattergood and Edge*, according to a manuscript report which I have of that case. But tho' this is so at common law, every body knows, that that which gave birth to the statute of Charles the second, was the contention then depending between the temporal and ecclesiastical courts, in relation to the power which the spiritual courts then exercised, of compelling distributions, and taking bonds for that purpose. The rise and progress of this dispute is mentioned in 3 *Mod.* 58. and *Raym.* 496. That statute hath ascertained that point in favour of the ecclesiastical courts; and the most material clauses in it are relative to their law, and to the course of proceedings in their courts. And the several expressions in the third section shew, that the main design of the act was (as hath been mentioned) to make the exercise of that jurisdiction in the ecclesiastical courts legal, which before that time was condemned in the temporal courts. And in the case of *Smith and Tracey*, lord Holt who was then one of the counsel argued strongly, that that statute was not to be construed by the rules of the common, but of the canon and civil law; and a consultation was thereupon awarded. In the case of *Carter and Crawley*, it was likewise held, that that statute was directory to the spiritual courts, and was grounded principally on their law and the practice of their courts. In a case at the rolls, the master of the rolls was of opinion, that the statute was to be construed according to the canon and civil law; and afterwards, upon an appeal, lord King agreed to that opinion. This statute of Charles the second therefore confirms the jurisdiction of the ecclesiastical courts which hath been mentioned, and enlarges it. It sets up the *collatio bonorum* which the civil law allows of. As this is so, the statute of James the second must be construed

construed by the civil and canon law likewise. In 1 *Vern.* 244. lord Hale was of opinion, that statutes made *in pari materia* were to be taken into the construction of one another; and that the statute of the 14 *Eliz.* relating to church leases, is a kind of an appendix to the 13 *Eliz.* relating to the same matter. And this rule of construction holds more strongly in the present case, than it did in that; for this statute of James the second is a continuance of that of Charles the second, with three additional clauses; and therefore it is to be considered, as if the statute of Charles the second was repealed, and reenacted in it. And if this is so, it is considerable what the civil law is in this particular; and by that law, an infant *in ventre sa mere* is considered as *in esse*, in those respects which are for the benefit of the infant, tho' not in those which are to his prejudice. This appears by many passages in the Digest. In the present case, the question is *de commodo ipsius partus* merely, and no way relates to the prejudice of this infant; therefore the decree must be accordingly.

ii. *Of customs in particular places.*

By a clause in the statute of distribution, as hath been observed, these customs are specially reserved and excepted. What these customs are, particularly within the city of London and the province of York, which comprehend so large and considerable a part of the kingdom, it is somewhat strange that so few authors have taken any pains to inform their readers or themselves. The civil law acknowledgeth not these customs; nor yet doth the common law: and therefore perhaps neither civilians nor common lawyers have judged them a proper subject for their inquiries. And yet the general notion thereof seemeth to have sprung from the civil law, which establisheth what the civilians call the *legitime*, or legal portion, altho' much different from these customs: And these customs are so ancient, and of ancient times were of such general and almost universal extent; that some of the greatest lawyers have doubted whether they were not part of the common law.

The matter in short seemeth to have been plainly thus: Before the conquest, lands were devisable by will; of which the gavelkind lands are a standing instance. And in more ancient times still, all the children, both male and female, inherited alike; and the estate, whether real or personal, descended to all equally. (1 *Salk* 251. *Hale's H. C. L.* 220. *Dalrymp. Feud.* 201, 202.) And this was agreeable to reason and nature; altho' not to the policy of government which succeeded. After the conquest chiefly, came in the military tenures with the feudal law. The eldest son was fittest to bear arms; and to the end that during the service he might be able to sustain the dignity of the military profession, he succeeded to the whole estate of land. And that the other children might not be destitute, a portion was provided for them out of the personalty, which the father might not give from them by will, nor the ordinary by distribution in case of intestacy.

All antiquity speaks of this as the general and established law, except only in some few boroughs and particular places, where the people lived
probably

probably by trade, and there were not lands sufficient for the support of arms: And this accounts for it, why the lands holden in burgage tenure continued still devisable by will, when no other lands were so, except only those of gavelkind in Kent and in divers parts of Wales, which received not the laws of the conqueror.

And this order continued during all those reigns, whilst the kings were supplied with soldiers by the lords of manors and others at a price and for a time agreed on. Until at last the kings and people coming into other measures for raising of soldiers, these military services dwindled away, and were changed into pecuniary compensations. Lands in the reign of king Henry the eighth became again devisable by will. The restraints upon the personalty vanished by degrees, and only some footsteps thereof remain in particular places. In the province of York, these military services were the longer necessary, by reason of the continual incursions of the Scots*; and to this day a great part of the lands within that province are not devisable by will; and until the reign of king William the third, a man there by his will might not dispose of his personal estate from his wife and children, further than his own proportionable part; and one would think by most, if not all, of the books which have been written upon the subject of wills, that have taken any notice of this matter at all, that the same law continueth still; as indeed it doth in the case of intestacies, altho' not in the case of last wills and testaments. For by the statute of the 4 *W. c. 2.* power is given to the inhabitants of the province of York, to dispose of their whole personal estate by will, notwithstanding their custom to the contrary; except only in the cities of York and of Chester: And by the 2 & 3 *An. c. 5.* the like power is given to the inhabitants of the city of York also. By the 7 & 8 *W. c. 38.* the like power is given to the inhabitants of the principality of Wales. And by the 11 *G. c. 18.* the like power is given

* In the county of Westmorland, there are many footsteps of this institution, in the customs of the several manors. In the manor of Ravenstonedale, wherein the customs were ascertained by indenture betwixt the lord and tenants, in the 3d and 4th of Philip and Mary, one article is, that *the tenants shall break or divide no farmholds*; or, as the same is explained by a further indenture in the 22d year of queen Elizabeth, that *none of the tenants shall divide or sever their ancient and customary tenements*, without special agreement with the lord or his steward for that purpose. Which custom, being rivetted by the indentures, continues to this day, altho' the cause hath long since vanished. But, by permission of the lords from time to time, so many severances have been made, that it is difficult to estimate within the said manor, what might have been the value of an original military tenement.

In the manor of Kentmire, in the said county, there are remains of an establishment, which seem to lead nearer to that point. It appears that the manor was anciently divided into four quarters; each quarter into fifteen tenements; that each tenement consisted of a proportionable quantity of inclosed ground, with pasture for ten cattle in a common pasture lying within each quarter respectively, and privilege for 80 sheep in another pasture common to the whole manor; that for each tenement a man served the office of constable, paid 2s a year to the curate of the chapel, and now pays 13s 4d rent to the lord of the manor. By which distinctions the tenements have been kept so far separate, that it is easy to calculate what the soldier's estate within that manor might be supposed to be worth by the year: for one of those ancient tenements, well husbanded, seemeth to be of the value at this day of about 8l a year.

to the freemen of the city of London. But the law concerning the distribution of intestates effects, in all the said places, continues as it was before.

Lord chief justice *Coke*, who might seem well able to give a good account of these customs, had a fair opportunity in his commentary on the great charter, where the *reasonable part* is mentioned; but he passeth it over slightly, contrary to his wonted manner, and says drily, that it is not by the common law: and quotes *Bracton* for the same; whereas *Bracton* doth not say so, but rather the contrary.

The author of the *Law of Testaments* (which seemeth to be a book not altogether destitute of merit) professeth expressly to treat of the customs of the city of London and province of York. And he hath collected a considerable number of cases relating to that subject. But with regard to the city of London, by some fatality, he hath recited the statute of the 11 G. c. 18. so imperfectly, that if he did understand it himself, it is impossible the reader should understand it from his manner of expressing it: but it is plain he did not understand it; for all which he delivers tendeth to prove, that the custom of the city of London extends to wills as well as to the distribution of intestates effects, and to wills especially. All which is in contradiction to the statute, as will appear. And of the statutes which give to the inhabitants of the province of York the like power to dispose of their whole personal estates by their last wills and testaments, he taketh not the least notice, nor ever mentions them.

Dr. *Gibson* was a native of the province of York; and received his patrimony by the law and custom of that province. He recites the statutes faithfully which take away the custom as to wills within the province at large, and within the city of York in particular, and also within the principality of Wales; but when he comes to speak of the aforesaid *reasonable part*, having recited briefly the words of *Bracton* and *Fleta*, and just mentioned the writs *de rationabili parte bonorum* in the register, he says a bare reference thereto may be sufficient, since the said right is so far abolished; and he adds, that it is now little more than matter of speculation, what we find in the *magna charta* itself concerning the same reasonable part. And when he comes to treat particularly of the distribution of intestates effects; altho' the clause of exception of these customs in the statute of distribution seemed to render an explication thereof in some sort necessary, yet he passeth it in silence.

Dr. *Swinburne* was judge of the prerogative court of York. He had great abilities, and opportunities more than any other person of his time, and inclination likewise, to obtain a competent satisfaction in this matter. His book, for the time in which it was written, is a most excellent book. And one can scarcely pardon the continuators of his work (altho' upon the whole of the better sort of this kind of authors) for attempting, as they pretend, to correct his style. It needeth no correction. *Swinburne* lived at a time, namely, in the latter end of queen Elizabeth's reign, when the style of writing was elegant and easy, according to the true standard of the ancients, and of nature; and utterly abhorrent from that

that formal bombast, which (from the royal example) succeeded in the next reign. But if they could have amended Swinburne's expression, they ought not to have done it; but in an edition of Swinburne, to have exhibited Swinburne: and where he might be judged to be wrong, or where the law since his time is altered (as it is in many cases), there was scope enough for animadversion other ways. But they have mangled Swinburne, and made no distinction betwixt what is his, and what is not. By breaking the connexion in improper places, and not always understanding him themselves, they have rendered even Swinburne sometimes unintelligible. All which is only intended as an apology, for having separated Swinburne throughout this title, from his editors or continuators; by inserting what is Swinburne's, in his own words, and under his own name; and by distinguishing what is an addition to Swinburne, at the end of the quotation, by the letter *a*.

As to the matter before us, we must despair of obtaining a more perfect delineation of the custom of the province of York, as it was in Swinburne's days, than Swinburne hath exhibited. He was a diligent searcher into antiquity; was nearer to the fountain head than we are by almost two hundred years; was acquainted personally with the most learned men of that time; and made it his employment, to examine minutely into this particular custom; and above all, was master of the acts and records of the court of York, and availed himself of that treasure. But what is most astonishing is, that even in the very last edition of Swinburne, where he is treating of this same custom, there is no notice at all taken (by the editors) of the statutes or acts of parliament, which at one stroke utterly abolished at least one half of this custom: but for any thing which appears, the reader must judge, that the inhabitants of the province of York cannot make their testaments of their personal estates, further than to the extent of the testator's own rateable part, which was, and in the case of intestates is still called the *death's part*. Indeed there is a sketch of one of the said acts, in a corner of the book elsewhere; inserted where it hath no manner of connexion, by those who did not understand, or did not consider, its importance and use.

There is some shadow of this custom, as was said before, in the civil law; and the proportions were thus: If there were four children or under, they had a third part equally amongst them; if five or more, they had a moiety. And the civil law allows a legitime to parents, but not to widows; whereas, on the contrary, the customs we speak of do allow a legal portion to widows, but not to parents. 2 *Domat*. 119, 121.

By the statute of *magna charta*, c. 18. in the ninth year of king Henry the third, it is said, generally; *If nothing be owing to the king or any other, all the chattels shall go to the use of the dead* (that is, to his executors or administrators), *saving to his wife and children their reasonable parts*: [Or rather, their *proportionable* parts;—"salvis uxori ejus & pueris ipsius *rationabilibus* partibus suis."]

Bracton, who wrote soon after this statute, delivers it in few words as the general law of the realm, that after debts and other necessary charges deducted,

deducted, the whole residue shall be divided into three parts; of which the children, if there be any, shall have one part; the wife, if she survive, shall have another part; and the third part the testator shall have free power to dispose of. If the testator hath no children, then one moiety shall be to the deceased, and the other moiety shall be reserved to the wife. If he shall die, having no wife, and having children surviving; then the deceased shall have one moiety, and the children shall have the other. If he shall die without either wife or child, then the whole shall remain to the deceased. *Braet.* 60, 61. And it is to be observed, that these proportions generally do govern the customs to this day.

And the same is delivered by the author of *Fleta*, almost in the same words; and he saith, as *Braet.* had said before, that this is the law, unless there be a custom to the contrary, as in cities, towns, and villages. *Fleta* b. 2. c. 57.

By a constitution of archbishop *Stratford*, which was in the 16 *Ed.* 3. it is ordered thus: *Forasmuch as it happeneth sometimes, that persons dying intestate, the lords of the fees do not permit the debts of the deceased to be paid out of their moveable goods, nor the said goods to be distributed to the use of their wives children or parents, or otherwise by the disposition of the ordinaries, according to that portion which by the custom of the country appertaineth to the deceased; we do decree, that none shall henceforth do the same, on pain of the greater excommunication.*

According to that portion which, by the custom of the country, appertaineth to the deceased] Lindwood says, The portion of the deceased was, what was assigned by the ordinary for the supposed benefit of the soul of the deceased; which was to be determined by custom: sometimes (says he) it was the whole personal estate, as when there was neither wife nor child; sometimes an half, as where there is a wife surviving, but no children; sometimes a third part, as where there is both wife and children. *Lind.* 178.

By the custom of the country] He doth not say, of the realm; and that for this reason (saith Lindwood) because perhaps throughout the whole realm one and the same custom as to this matter doth not prevail; but there are different customs according to the diversities of countries: for there may be a general custom of some province; also a special custom of some city, territory, or place. *Lind.* 172.

Fitzherbert saith, The writ *de rationabili parte bonorum* lieth, where the wife or sons and daughters of the deceased cannot have their *reasonable part* of the deceased's goods, after the debts are paid, and funeral expences satisfied. *F. N. B.* 284.

And it seemeth, he says, by the statute of *magna charta*, c. 18. that this was the common law of the realm; and so (he says) it appeareth by *Glanvil.* *F. N. B.* 284.

And in the 31 *Ed.* 3. A woman did demand the moiety of her husband's goods because he had no children, and counted upon the custom of the realm. *F. N. B.* 284.

Wills. Distribution.

But in after times, and by degrees, they came to count for the same upon the particular custom of such and such places. *F. N. B.* 284.

And accordingly the writs in the register do rehearse the customs of particular counties; and are of this form:

“The king to the sheriff &c. If *W*, who was the wife of *D*, shall make us secure &c. that then you summon *E* and *E*, executors of the testament of the aforesaid *D*, that they be &c. to shew why, seeing that according to the custom in the county aforesaid hitherto obtained, wives after the death of their husbands ought to have their reasonable part of the goods and chattels of their husbands, they the same executors aforesaid from her the said *W* her reasonable part to the value of ten marks of the goods and chattels which were of the aforesaid *D* heretofore her husband they do detain, unjustly, and refuse to render them unto her; to the great damage and grievance of her the said *W*, and against the custom aforesaid. And have you there the summons and this writ &c.”

“The king &c. Forasmuch as *B* of——and *S* his sister have made us secure &c. that you summon *E* and *E* executors of the testament of *D* of——that they be &c. to shew why, seeing that according to the custom in the county aforesaid hitherto obtained and approved, children after the death of their fathers, who are not their heirs, nor were promoted in the life of their fathers, ought to have their reasonable parts of the goods and chattels which were of their fathers, they the same executors aforesaid from the aforesaid *B* and *S* after the death of the aforesaid *D* their father, whose heirs they are not, and who were not promoted in the life of the same their father, their reasonable parts to the value of ten pounds of the goods and chattels which were of the aforesaid *D* their father they do detain, unjustly, and refuse to render the same unto them; to the great damage and grievance of them the said *B* and *S*, and against the custom aforesaid. And have you there the summons, and this writ &c.”

In the case of *Stapleton and Sherrard*, *H.* 1684. (1 *Vern.* 305.) It was said, that the custom of the province of York is the same with the custom of the city of London, unless in the case where the eldest son hath lands by descent: but it will appear when we come to treat of them separately, that there are other differences.

And first of the custom of the city of London.

iii. Of the custom of the city of London in particular.

Statute enabling to dispose by will.

1. By the 11 G. c. 18. *Whereas great numbers of wealthy persons, not free of the city of London, do inhabit and carry on the trade of merchandize and other employments within the said city, and refuse or decline to become freemen of the same, by reason of an ancient custom within the said city, restraining the citizens and freemen of the same from disposing of their personal estates by their last wills and testaments; to the intent therefore that persons of wealth and ability, who exercise the business of merchandize and other laudable employments within*

within the said city, may not be discouraged from becoming free of the same, by reason of the said custom, it is enacted, that it shall be lawful to all persons who shall after June 1, 1725, be made free, or become free, of the said city; and also for all persons who are already free, and on the said first day of June 1725 shall be unmarried and not have issue by any former marriage, to give and devise will and dispose of their personal estates, to such uses as they shall think fit; any custom or usage in the said city, or any by-law or ordinance made or observed within the same, to the contrary thereof in any wise notwithstanding. *l.* 17.

Provided, that in case any person, who shall at any time after the said first day of June 1725 become free of the said city; and any person who is already free, and on the said first day of June 1725 shall be unmarried, and not have issue by any former marriage,—bath agreed or shall agree by any writing under his hand, upon or in consideration of his marriage or otherwise, that his personal estate shall be subject to or be distributed or distributable according to the custom of the city of London; or in case any person so free, or becoming free as aforesaid, shall die intestate: in every such case, the personal estate of such person so making such agreement, or so dying intestate, shall be subject to, and be distributed and distributable according to the custom of the said city; any thing herein contained to the contrary notwithstanding. *l.* 18.

So that as to intestates, the custom continueth as it was before: which seemeth to be as follows.

2. If a freeman of London dies, in London or elsewhere, leaving a widow and a child or children; his personal estate (after his debts paid, and the customary allowance for his funeral, and for the widow's chamber, being first deducted thereout) is by the custom of the said city to be divided into three equal parts, and disposed of in the following manner; to wit, one third part thereof to the widow, another third part to the children, and the other third part (being taken out of the custom) is now made subject to the statute of distribution; and so dividing the whole into nine parts, four ninths belong to the wife, and five ninths to the children. 2 *Salk.* 426. *L. Reym.* 1328. 1 *Vern.* 180. Note, in the case of *Biddle and Biddle*, 18 Mar. 1718. before lord Parker, it was said, that the widow is intitled to the furniture of her chamber; or in case the estate exceeds 2000*l.*, then to 50*l.* instead thereof. *Vin. Tit. Customs of London.* B. 2.

Custom of distribution in case of intestacy.

If a freeman bath no wife, but bath children; the half of his personal estate belongs to his children, and the other half (being the dead man's part) is in like manner distributable by the statute. 1 *P. Will.* 341.

So if he bath a wife, and no children; half of his personal estate belongs to his wife, and the other half is distributable; and in this case one moiety of the dead man's part distributable by the statute as aforesaid, belongeth unto the wife by the said statute: so that in the whole she will have three fourths of the personal estate, besides her widow's chamber. 2 *Salk.* 246. *Law of Test.* 211.

If he hath neither wife nor child at the time of his death; then the whole belongs to the deceased, and is distributable by the statute. *Law of Test.* 192.

The death's
part distribut-
able accord-
ing to the sta-
tute of distri-
bution.

3. Concerning which death's part, to be distributed by the statute, it is enacted by the 1 J. 2. c. 17. as followeth: *For the determining some doubts, arising on the statute of frauds and perjuries, it is enacted and declared, that the clause therein whereby it is provided that that act or any thing therein contained should not any ways prejudice or hinder the customs observed within the city of London and province of York, was never intended nor shall be taken or construed to extend to such part of any intestate's estate, as any administrator, by virtue only of being administrator, by pretence or reason of any custom, may claim to have to exempt the same from distribution; but that such part in the hands of such administrator shall be subject to distribution, as in other cases within the said act. f. 8.*

It was called the dead man's part, because the ordinary, or he to whom the ordinary should commit administration, was to dispose of the same to pious uses, for the benefit of the soul of the deceased; but administrators, under pretence of concealed debts, did frequently keep the greatest part thereof to their own use: And after this statute of the 1 J. 2. in the case between the widow and the son of Sir Richard How, knight, the widow as administratrix claimed to herself the death's part by virtue of the letters of administration granted to her of her husband's estate; but this, being thought unreasonable, was contested by the son in chancery with his mother in law; and upon hearing the cause, it was settled and decreed to be observed for ever, that the deceased's part should be divided according to the statute of distribution, in pursuance of this explanatory clause of the 1 J. 2. c. 17. *Green's Privil. 49, 50.*

Superinten-
dency of the
court of or-
phans.

4. The court of orphans is held by custom time out of memory, before the lord mayor and aldermen of the city of London; who are guardians to the children of all freemen of London, that are under the age of twenty one years at the time of their father's decease. *Privilegia Londini. 288.*

And if a freeman or freewoman die, leaving orphans within age unmarried; the court of orphans shall have the custody of their body and goods: and the executors or administrators shall exhibit inventories before them, and become bound to the chamberlain to the use of the orphans to make a true account upon oath, and if they refuse, shall commit them till they become bound. *Priv. Lond. 280.* And their being bound so to do in the spiritual court, excuseth them not from this custom. *Law of Ex. 252.*

For if the father is a freeman of London, he cannot devise the disposition of the body of his child; and if he do, yet the infant shall remain in the custody of the mayor and aldermen. *Privil. Lond. 287.*

Children in-
titled, tho'
born out of
the city.

5. The children of a freeman of London are intitled to their share of his personal estate, tho' they were born out of the city; and tho' their father did not inhabit or die in London. *Law. of Test. 202.*

And also, tho' their estate doth not lie in the city, but elsewhere. *Privil. Lond. 288.*

Child intit-
led, tho' born
after the fa-
ther's death.

6. An after-born child shall come in with the rest for a customary share of the father's personal estate. *T. 1718. Walsam and Skinner. Prec. Cha. 499.*

7. *T. 1706. Wilcocks and Wilcocks.* A child intitled to an orphanage share of his father's personal estate, dying under twenty one, and unmarried, cannot devise it by his will; for by the custom it survives to the other children: But he may devise the share which he hath under the statute of distribution. 2 *Vern.* 559.

Child dying, the orphanage part survives.

In the case of *Fouke and Lewen, M. 1682*; it is said, that if a man marries an orphan, who dies under twenty one; her orphanage part shall not survive to the other children, but shall go to the husband.

But in the case of *Merriweather and Hester, T. 5 G.* a case was cited between *Ambrose and Ambrose*, and another between *Rawlinson and Rawlinson*, where it had been certified to be the custom of London, and was accordingly decreed by the lord chancellors *Harcourt* and *Cowper* successively, that if a city orphan dies before 21, his orphanage part survives to the other orphans, and that he can make no disposition by will to contradict it; but if he dies after 21, at which time he might by will have disposed of it, there, tho' he die intestate, it shall go according to the statute of distribution, between his mother and surviving brothers and sisters; and that in the other case, where he dies before 21, the survivorship holds only as to the orphanage part belonging to himself, so that if he had by survivorship the part of any other of his brothers or sisters, that should go according to the statute of distribution. It was also said, that if a man marries an orphan, yet till twenty one his right is not so vested as to prevent his wife's share from surviving, in case she died before twenty one. *Prec. Cha.* 537.

So if a man marries an orphan, and dies; his representatives are not intitled to any part of what was his wife's customary share, but the whole belongs to the wife. *Viner. Custom of London.* (B. 10.) 18.

8. A wife divorced for adultery, shall not have her customary share. *Bunb.* 16. Wife divorced.

9. Where the husband was attainted of felony, and pardoned on condition of transportation; and afterwards the wife became intitled to some personal estate as orphan to a freeman of London; this personal estate was decreed to belong to the wife, as to a feme sole. *T. 1729. Newsome and Bowyer.* 3 *P. Will.* 32. Husband attainted.

10. If a freeman, having several children, or but one child, doth fully advance all his children or his single child; this satisfies the custom, and is the same as if he had no child, and his personal estate shall go as if there was none. So if a freeman compound with his wife before marriage, for her customary part; it is the same as if there was no wife. 2 *P. Will.* 527. Wife or children advanced.

M. 1710. Hancock and Hancock. Where the wife of a freeman of London is compounded with before marriage, by settling a jointure, altho' of land; the wife is taken as advanced, and the children by the custom of London shall have a moiety as if the wife was dead. So if all the children are advanced, the wife shall have a moiety. 2 *Vern.* 665.

H. 1718. Babington and Greenwood. A jointure by a freeman on his wife in bar of dower, will not bar her of her customary part: otherwise it is, if said to be in bar of her customary part. 1 *P. Will.* 530.

Wills. Distribution.

M. 1727. *Lewin and Lewin.* If a woman, before marriage with a freeman of London, accepts of a settlement upon her, to take effect after her husband's death in case she survives him, of part of his personal estate (without taking notice of the custom of London), she is thereby barred of her customary part of his personal estate. 3 *P. Will.* 16.

T. 1734. *Pusey and Desboverie.* Lord chancellor Talbot, taking notice of the contrary determinations made by the court in this point, said it had been of late settled, that where a wife was compounded withal, it should be taken as if there was no wife; and consequently that the husband should have one moiety, and the children the other. The like was held by the lord Hardwicke, in the cases of *Medcalf* and *Ives*, and of *Morris and Burrow*, in the year 1737. 1 *P. Will.* 644.

What shall be
deemed a suf-
ficient ad-
vancement.

11. It is said, generally, by the author of the *Law of Testaments*, that any provision made by the father in his life time for his children, is advancement within the custom; but a settlement of a real estate on a child is no advancement, nor to be brought into hotchpot. *Law of Test.* 204.

But Mr. *Vernon* questioneth, whether every provision made by the father for his child be an advancement, or whether only such a provision as is made on the marriage of a child? And he answers, that it seemeth to be only such a provision as is made on marriage, or in pursuance of a marriage agreement. 1 *Vern.* 89.

And in the case of *Jenks and Holford*, *M.* 34 *C.* 2 The plaintiff exhibited his bill, setting forth that his wife's father was a citizen of London, and that he had not advanced her in his life time, and demanded her customary part, and prayed an account. It was insisted on the defendant's part, that the plaintiff's wife was advanced by her father in his life time, he having given her 400 l. But the lord chancellor was of opinion, that it could not be any advancement, unless it had been given her as a marriage portion, or in pursuance of a marriage agreement; and the 400 l. were not given till a long time after her marriage, and without any agreement that the same should be for her marriage portion, and was a free gift, great part of the sums that made up the 400 l. being given at christenings and lyings in. Next, it was insisted for the defendant, that these several sums, howsoever given, ought (if the plaintiff will come in for his wife's customary part) to be cast into hotchpot: But the plaintiff's council denied it; and took a difference betwixt a free gift subsequent to the marriage, and where the same is given in marriage; and compared it to the case of an heiress, where she has lands given her in frank marriage, those must be cast into hotchpot; but otherwise it is of lands conveyed or given to her by her father or other ancestor after the marriage. But not allowed by the lord chancellor. And the plaintiff not consenting to cast into hotchpot the 400 l. given unto his wife as aforesaid, the bill was dismissed. 1 *Vern.* 61.

H. 1683. *Civil and Rich.* The custom of the city of London touching orphans was certified to be; that where an heir or coheir had a real estate settled on him by the father, the same was out of the custom of the city of London; and tho' the father should afterwards declare the same to be a full advancement for such child, yet that was no bar to his orphanage

phanage part, neither was it to be brought into hotchpot; but was clearly out of the custom: And it was said, that by the custom of the city of London, where a child is married with the father's consent, and there is a portion given in marriage; such child is debarred from claiming any benefit of the orphanage part; unless the father shall, by writing under his hand and seal, not only declare that such child was not fully advanced, but likewise mention in certain, how much the portion given in marriage did amount unto; that so it may appear what sum is to be brought into hotchpot. 1 Vern. 216.

M. 1685. *Annand and Honeywood*. The question was, whether money given by the father to be laid out in land to be settled on the son and the intended wife for their lives, with remainders in tail, should be reckoned to be an advancement by part of the personal estate of the father, so as that the son ought to bring the same into hotchpot, to intitle him to a share of the personal estate. Lord chancellor; There is no colour to reckon this any part of the personal estate. 1 Vern. 345.

T. 1699. *Chace and Box*. If any freeman's child be married in the life time of his or her father, by his consent, and not fully advanced to his full part or portion of his father's personal or customary estate, as he shall be worth at the time of his decease; such freeman's child so married as aforesaid, shall be excluded and debarred from having any farther part or portion of his or her said father's personal or customary estate to be had at the time of his decease; except such father, by some writing by him written and signed with his name or mark, shall declare and express the value of such advancement: And then every such child, after the decease of his father, producing such writing, and bringing such portion so had of his father into hotchpot, shall have as much as will make up the same a full child's part or portion of the customary estate which his father had at the time of his decease; notwithstanding such father shall by any writing under his hand and seal declare such child was by him fully advanced. L. Raym. 484.

Note, it is said to be sufficient if he declare the same by any writing under his hand, or by any thing written by him, altho' it be in an almanack, or elsewhere. *Green's Privil. of L.* 53.

H. 1708. *Dean and lord Delaware*. The father's declaring, that the child was fully advanced or not advanced, was of no avail, unless it appeared what the advancement was in certainty; to the intent it might be known, whether such advancement did amount unto as much as would have belonged to the child by the custom. 2 Vern. 630.

T. 1729. *Cleaver and Spurling*. If a freeman hath advanced his child on marriage, and the certainty of that advancement doth not appear under the freeman's hand; this is to be taken as a full advancement: but the freeman's declaration alone that he hath fully advanced his child, is not of itself sufficient; for at that rate it would be in the power of every freeman, by making such declaration, to bar his child of the orphanage part. 2 P. Will. 527.

12. The child of a freeman of London, when of age, may in consideration of a present fortune, bar herself of her customary part. As in the case
 Child of age may release the customary part.

case of *Lockyer and Savage*, M. 6 G. 2. The father, on his daughter's marriage, agrees to give her 3000l; which she, being of age, covenants to receive in full of her customary share as a freeman's daughter: and tho' it was objected, that such a future right cannot be released, and that parents might make an ill use of the power they have over their children, in forcing them to give such discharges; yet this was held a good bar of the custom, there being no fraud in the transaction. 2 *Abr. Cas. Eq.* 272. *Str.* 947.

Whether the
husband can
release.

13. In the case of *Kemp and Kelsey*, M. 1720. The plaintiff's wife was a freeman's daughter; and after her marriage, her father gave her 100l, and the plaintiff executed a release for the 100l, in full of all his wife's customary part or share which was or might be due to her by the custom of London. The father died. A bill was brought for a discovery of the personal estate, and that upon the plaintiff's bringing the 100l into hotchpot, they might be let in to a customary part of the father's estate. The defendant pleaded the release in bar. And by the lord chancellor *Macclesfield*: The husband had no power to release a future interest of his wife's. She might survive him; and would then be intitled to it in her own right. Besides, this release is suggested to be fraudulently obtained. And therefore his lordship ordered the plea to stand for an answer, with liberty to except, so as to have an account of the freeman's personal estate, and the benefit of the release to be saved to the hearing, when the question would come more properly, whether the release by the custom was good or not. 2 *Abr. Eq. Cas.* 267.

E. 1725. *Cox and Belitka*. A freeman of London had two daughters and one son. One of the daughters married; and on receiving a suitable portion, the husband released all right and interest which he had or might have to any part of the father's personal estate by the custom or otherwise; and covenanted that at any time after the death of the father, he would do any further act for the releasing of any right which he might have by the custom. *Jekyll and Gilbert*, commissioners, inclined to think, that the release being for a valuable consideration, purporting an agreement to quit the right to the orphanage part, to be binding in equity; but tho' this might not be so clear, yet the covenant for a valuable consideration to release the future right is good: And they decreed on the execution of the release. 2 *P. Will.* 272.

Whether
marriage
without con-
sent bars the
custom.

14. In the case of *Hill and Blanket*, H. 28 C. 2. It is said, that there is no such custom, as that a child marrying under the age of eighteen, without the father's consent, shall lose her orphanage part. *Cha. Ca. Finch.* 248.

But in the case of *Foden and Howlett*, H. 1 J. 2. By *Jefferies* lord chancellor: If the daughter of a citizen of London marries in his life time against his consent, unless the father be reconciled to her before his death, she shall not have her orphanage share of his personal estate: and it would be unreasonable to take the custom to be otherwise. 1 *Vern.* 354.

And if any person intermarry with an orphan without consent of the court, such person may be fined by them, according to the quality and
6 portion

portion of the orphan; and unless such person pay the fine, or give security to pay it, they may commit him to Newgate to remain there till he submit to their orders. *Priv. Lond.* 282, 283.

And he that marries an orphan without consent of the court, must make a jointure before he receives the portion. *Priv. Lond.* 286.

15. *E.* 1686. *Fowke and Hunt.* A freeman of London dies, leaving a widow and no children, but hath several grandchildren living at the time of his death. And the question was, whether they were within the custom of the city of London or not. The lord chancellor took time to consider of it; and having consulted the recorder and several of the aldermen, delivered his opinion, that grandchildren were not within the custom of the city of London. 1 *Vern.* 397.

Custom extends not to grandchildren.

H. 1716. *Northey and Strange.* It was admitted by counsel, and said to have been so determined, and settled, that a freeman's grandchild (where the grandchild's father was never advanced in the freeman's life time, and died before the freeman, leaving a child) was not within the custom; and that only the freeman's children were within the custom, to come in for an orphanage part. 1 *P. Will.* 341. 2 *Salk.* 426.

16. If a freeman of London hath but one child, and he has received some portion from his father, and the father dies, leaving this child and a wife; the child shall have his full orphan's part, without any regard to what he hath already received: for that advancement in part is only to be brought into hotchpot with children, and not with others: By Sir Edward Northey. 2 *Salk.* 426.

Hotchpot only amongst children.

M. 1685. *Beckford and Beckford.* The only point was, upon the custom of the city of London, where a child that had a portion, but was not fully advanced, and was to bring her portion into hotchpot; whether the portion should be brought into the personal estate in general, that to the widow might come in for part of it, or whether it should be brought into the orphanage part only: Lord chancellor; It is beyond all doubt, that it must be brought into the orphanage part only. 1 *Vern.* 345.

T. 1691. *Fane and Bence.* Where an only child is in part advanced by the father in his life time; such child shall not bring his part into hotchpot, there being none in equal degree with him. 2 *Vern.* 234.

T. 1729. *Cleaver and Spurling.* A freeman of London having but one child, advanceth that child in part only; the child shall take a full share, without bringing what he had before received into hotchpot: for the only meaning of bringing the child's share into hotchpot is, to make an equality among the children; and not for the benefit of the mother, or to increase the deadman's share. 2 *P. Will.* 526.

17. A lease for years attending the inheritance of a freeman of London, Lease is not assets within the custom. 1 *Vern.* 2. 102.

18. So if a citizen of London has a trust of a term attending his inheritance, and dies; the trust of the term shall not be subject to the custom of London, to be divided between the wife and children, as other personal estate and chattels shall. 2 *Freem.* 66.

Trust of a term.

19. A mortgage in fee shall be counted part of a freeman's personal estate, and subject to the custom. 1 *Cha. Ca.* 285.

A

Wills. Distribution.

A mortgage shall be paid out of the personal estate, in preference to the customary or orphanage part by the custom of London; because the custom of London cannot take place till after the debts paid. 2 *P. Will.* 335.

iv. Of the custom of the province of York.

By the statute of distribution 22 & 23 C. 2. c. 10. it is provided, that the said act or any thing therein contained, shall not any ways prejudice or hinder the customs observed within the city of London, or within the province of York, or other places, having known and received customs peculiar to them, but that the same customs may be observed as formerly; any thing therein contained to the contrary notwithstanding. s. 4.

And by the 1 J. 2. c. 17. For the determining some doubts arising upon the said statute, it is thereby enacted and declared, that the clause therein by which it is provided, that the same statute or any thing therein contained should not any ways prejudice or hinder the customs observed within the city of London and province of York, was never intended, nor shall be taken or construed to extend to such part of any intestate's estate, as any administrator, by virtue only of being administrator, by pretence or reason of any custom, may claim to have to exempt the same from distribution; but that such part in the hands of such administrator shall be subject to distribution as in other cases within the said statute. s. 8.

By virtue only of being administrator] The part which the administrator hath by virtue only of his being administrator, is the deadman's part; which being taken out of the custom, this statute of the 1 J. 2. c. 17. provides that the same shall be distributed according to the statute of distribution.

And agreeable hereunto was the case of *Stapleton and Sherrard*, Feb. 5th in the 3 Ja. 2. which cause was depending when this statute was made: Between John Stapleton, esquire, and Thomas lord Meryon, plaintiffs; Bennet Sherrard, esquire, and Dorothy his wife, administratrix of the goods of Robert Stapleton, esquire, defendants:—This cause having been first heard, on the 13th day of June, in the 35th of Cha. 2. and it being then referred to a master to take an account of the personal estate of the said Robert Stapleton, and to make exact distribution of the same according to law, amongst the plaintiff Stapleton, and the child of the lord Meryon, and also the brothers and sisters of the said Robert Stapleton, as well those of the whole blood, as of the half blood, and their respective representatives; the defendant, in right of the defendant Dorothy as she is widow of the said intestate Robert Stapleton, claiming a moiety of the clear personal estate by the custom of the province of York, and also by the late act for settling intestates estates half of the other moiety thereof; and the said master being thereby to report specially to this court, as he should think fit, what should appear doubtful as to the interest of any of the parties concerned therein, the said master made his report dated the 9th day of June 1684, whereby he certified, that by the custom of York, a moiety of the said clear personal estate was of right due and belonging

longing to the defendant Dorothy, as the widow and relict of the said Robert Stapleton, and that the other moiety he had divided amongst the said intestate's brothers and sisters, and their legal representatives, in such proportions as is therein mentioned. And exceptions having been put in to the said report, and the same coming to be heard the 24th day of February in the first year of king James the 2d, before the right honourable the lord keeper of the great seal of England; his lordship desired his grace the then lord archbishop of York to certify, when a man dies intestate within the province of York without issue (after his debts and funerals paid) how the residue was to be divided by the custom of the province of York, and what part remained by the ordinary to be distributed. And his grace the then archbishop of York having, pursuant to the said desire, on the 18th day of March in the 1st year of James the 2d, certified that in such cases aforesaid, the widow of the intestate by the custom of the said province, hath usually had allotted to her one moiety of the clear personal estate, and that the other moiety had been distributed amongst the next of kin to the deceased intestate, and that had been the constant practice of the ecclesiastical court at York. To which certificate the said defendants took exceptions. Upon debate whereof on the 17th of May in the said first year of James the 2d, it was ordered, that the exceptions should be overruled; and the defendants were ordered to pay unto the plaintiffs, and bring into court respectively, the several and respective sums of money therein in that behalf mentioned within two months, or in default thereof, or if the plaintiffs should not acquiesce therein, then they were to pay costs. And the defendants being not satisfied with the said order, did afterwards petition the right honourable the lord high chancellor of England for a rehearing of the said cause, upon this point only, namely, whether the defendant Dorothy, being the widow of the said Robert Stapleton, who died an inhabitant of the province of York, and without issue, and also his administratrix, ought not by virtue of the custom of the said province, to have one moiety or half of the clear personal estate of the said intestate Robert Stapleton her late husband, and also according to the rules of distribution mentioned in the late act for settling intestates estates to have half of the other moiety as widow of the said Robert Stapleton, who died without issue as aforesaid. And his lordship having ordered the said cause to be reheard upon that point only, and the same coming to be reheard accordingly before his lordship in the presence of the defendant's counsel, none attending for the plaintiffs, albeit due notice of the said last order for rehearing was given to them and the other parties concerned, as by affidavit then produced did appear; and the case on the pleadings in the cause being opened by the defendant's counsel, and upon consideration thereof, and of the said late act for settling of intestates estates, and of the statute made in the 1st year of his said majesty king James the 2d, intituled, an act for reviving and continuing several acts of parliament therein mentioned; his lordship declared, that notwithstanding the said certificate of the said lord archbishop of York, his lordship was fully satisfied, the defendant in right of the defendant Dorothy as widow of the said intestate Robert Stapleton her late husband ought to have the

one moiety or half of his clear personal estate by virtue of the custom of the province of York, and also half of the other moiety of the said clear personal estate by virtue of the said statute and rules of distribution therein mentioned; and did order and decree the same accordingly. And it being alledged, that the defendants in pursuance of the said former decree, and to avoid any contempt for not yielding obedience thereto, had paid and satisfied unto the plaintiffs and others the brothers and sisters of the said intestate Robert Stapleton, or their respective representatives or some of them, the respective proportions to them respectively allotted by the master's report, whereas they ought but to have paid one moiety thereof, and prayed that the plaintiffs and the said other persons that were so overpaid might refund and pay the defendants the moiety or half of the money so paid or satisfied unto them, his lordship did order and decree the same accordingly, and the 5l deposited with the register upon the granting of the said rehearing to be paid back to the defendants or their clerks in court. Afterwards on the 8th day of June in the 3d year of the reign of his said majesty king James the 2d, the plaintiffs being dissatisfied with the said order made, petitioned his lordship to hear the cause again; and the same coming to be reheard accordingly on the 5th day of February in the year aforesaid, before his lordship, in the presence of counsel learned on both sides, upon long debate of the matter, and hearing what could be alledged on either side, his lordship declared the defendant's wife is well intitled to one moiety of her late husband's estate by the custom of the province of York, and to a moiety of the other moiety by the act of distribution, and therefore saw no cause to alter the former order; and therefore did order, that the said former order should stand confirmed.

By the 4 W. c. 2. *Whereas by custom within the province of York, or other usage, the widows and younger children of persons dying inhabitants of that province, are intitled to a part of the goods and chattels of their late husbands and fathers (called her and their reasonable part) notwithstanding any disposition of the same by their husbands and fathers last wills and testaments, and notwithstanding any jointures made for the livelihood of the said widows by their husbands in their life time, which are competent, and according to agreement; whereby many persons are disabled from making sufficient provision for their younger children: for remedy thereof, it is enacted, that it shall be lawful for any person inhabiting or residing, or who shall have any goods or chattels within the province of York, by their last wills and testaments to give bequeath and dispose of all and singular their goods chattels debts and other personal estate, to their executors, or such other persons as they shall think fit, in as ample manner as by the laws and statutes of this realm any person may give and dispose of the same within the province of Canterbury or elsewhere; and the widows, children, and other the kindred of such testator, shall be barred to claim or demand any part of the goods chattels or other personal estate of such testator, in any other manner than as by the said last wills and testaments is limited and appointed. s. 1, 2.*

Provided, that nothing in this act shall extend to the citizens of the cities of York and Chester, who shall be freemen of the said respective cities, inhabiting therein or within the suburbs thereof at the time of their death; but that every such citizen's widow and children shall have such reasonable part and proportion of

of the testator's personal estate, as they might have had by the custom of the province of York before the making of this act. s. 3.

Note, the mentioning of the city of Chester here was a mistake; for this custom of the province of York did not extend to that city, nor to any other part of the whole archdeaconry of Chester: and the reason is, because until the erection of the see of Chester in the time of king Henry the eighth, that archdeaconry was not within the province of York, but was part of the diocese of Litchfield and Coventry within the province of Canterbury. And therefore afterwards, when this proviso was taken off by the statute here next following, with respect to the city of York; there was no need for any application to parliament to repeal the same proviso, in relation to the city of Chester.

But as to the city of York, it is enacted by the 2 & 3 An. c. 5. as followeth: *Whereas in the statute of the 4 W. c. 2. there is a proviso, that nothing in the said act contained should extend or be construed to extend to the citizens of the cities of York and Chester, who should be freemen of the said respective cities, inhabiting therein, or within the suburbs thereof, at the time of their death; but that every such citizen's widow and children should have such reasonable part and proportion of the testator's personal estate, as they might have had by the custom of the province of York before the making of the said act: And whereas notwithstanding, the mayor and commonalty, on behalf of the inhabitants of the said city of York, have requested that the said proviso may be repealed, so that the freemen of the said city may have the benefit of the said act, as well as all other persons inhabiting within the said province; it is enacted, that the said proviso, so far as the same concerneth the citizens of the city of York, shall be and is hereby repealed; so that it shall and may be lawful for all and every the citizens of the said city of York, who shall be freemen of the said city, inhabiting therein, or within the suburbs thereof, at the time of their death, by their last wills and testaments to give bequeath and dispose of their goods chattels debts and other personal estates, to their executors or such other persons as they shall think fit, as any other persons inhabiting or residing within the said province of York may lawfully do by virtue of the said act; and that the widows, children, and other kindred of such testator, shall be barred to claim or demand any part of the goods chattels or other personal estate of the testator, in any other manner than as by the said last wills and testaments is appointed; any thing in the said act, or any other law, statute, or usage to the contrary notwithstanding.*

So that the ancient law and custom restraining the inhabitants of the province of York from disposing of their whole personal estates by will, is now utterly abolished out of that whole province.

But with respect to the distribution of intestates effects, the custom continues as it hath been for ages past: which, taking Swinburne for our guide, we come now to trace out and delineate.

It is to be understood then, that within the province of York generally, there hath been an ancient custom, and divers famous writers long ago have made mention of the said custom in their works to have been observed long before their days, and the same also appeareth from the acts and other very ancient instruments of undoubted credit faithfully

fully preserved in the registry of the archbishop of York; by which custom *there is due to the widow and to the lawful children of every man being an inhabitant or an householder within the said province of York, and dying there or elsewhere intestate, being an inhabitant or householder within that province, a reasonable part of his clear moveable goods: unless such child be heir to his father deceased; or were advanced by his father in his life time, by which advancement it is to be understood, that the father in his life time bestowed upon his child a competent portion whereon to live.* Swin. 220, 230, 233.

Reasonable part] Which is as followeth:

(1) If the intestate hath *neither wife nor child* at the time of his death, his whole personal estate (the funeral expences and other necessary charges being first deducted) shall be disposed in the due course of administration; the same heretofore having been wholly at the disposal of the deceased, and consequently falling now under the directions of the statute of distribution. Swin. 220.

(2) If the intestate at the time of his death leave behind him *a wife and no child*, or else some *child or children but no wife*; in this case, by the custom observed not only throughout the province of York, but in many other places besides within this realm of England, the goods are to be divided into two parts; of which, one part is due to the wife, or else to the children, by virtue of the said custom. Swin. 220.

But if by settlement a jointure is limited to the wife, in bar of all her demands out of the personal estate of her husband by virtue of the custom, in such case it is as if there were no wife, with respect to the said customary part; so, if it is in bar of all her demands by virtue of the said custom *or otherwise*, she shall be debarred also of any distributive share by the statute. 1 Vern. 15.

And if the intestate have a wife, and a child or children which child is *heir* to the intestate, or which children were *advanced* by the father in his life time; in this case it is as if he had no child: and therefore in like manner the goods shall be divided into two parts; whereof the wife is to have the one part to herself, and the other half is distributable by the statute. Swin. 220, 221.

So in the case of *Goodwin and Ramsden*, M. 1683. The plaintiff exhibited a bill, to have an account, and her share of her father's personal estate, who died intestate. The defendant pleaded, that the estate in question lay within the province of York, and that the intestate died there, and that the plaintiff being one of his daughters was advanced by him in his life time; and that by the custom of the province of York, a daughter being once advanced by her father in his life time, was excluded from all further benefit of her father's personal estate. But in this case it appearing, that all the children of the intestate were advanced by him in his life time, and so the estate wholly exempted out of the custom, it ought to go now in a course of administration, and be distributed according to the act for settling intestates estates; and thereupon the plea was overruled. 1 Vern. 200.

And in the case of *Collinson and Trotter*, Jun. 24. 1727. Richard Collinson died intestate, leaving a widow, who was the present defendant,

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Anne Trotter; and an only child, Thomas Collinson, the plaintiff in this cause. Sir Joseph Jekyll, master of the rolls, directed two issues to be tried at York assizes: 1. Whether the defendant Anne Trotter, who was the widow, is intitled by the custom of the province of York to a moiety, or any and what part, of the intestate's estate. 2. Whether the plaintiff Thomas Collinson the infant, who is intitled to lands in fee simple by descent, on the death of his said father, is by the custom of the said province intitled to any and what part of his said father's personal estate. These two issues were tried accordingly at the summer assizes following. And after long evidence given, the jury found, as to the first issue, that the wife is intitled by the said custom to a moiety of the intestate's personal estate: And, as to the second, that the son is excluded, by the descent of the fee simple estate, from claiming any part of the personal estate by the said custom. And consequently, the widow would receive one half of the personal estate by the custom; and one third of the remaining half by the statute: So that taking the whole together, she would receive two thirds of the said intestate's personal estate.

(3) If the intestate at the time of his death had *both a wife and also a child or children*; in this case, the deceased's share is no more than the third part of the clear goods: for the said goods shall be divided into three parts; whereof the wife ought to have one part, the child or children another part, and the third part (which is called the death's part) is distributable by the statute. Yet so, as that the child or children be not *heir* to the intestate their father, or *advanced* by him in his life time: for then it is as if there were no child; and consequently the goods of the deceased are to be divided into two parts, whereof the intestate's wife is to have the one part, and the other is distributable by the statute. And if the intestate have a wife, and children whereof one is *heir*, another *advanced*, and some *not advanced* by their father in his life time; in this case, the goods of the deceased shall be divided into three parts, whereof the wife shall have one, the child or children not advanced another, and the third (being the death's part) is distributable as aforesaid. *Swin.* 221.

But here ariseth a very important question, in case where a child hath received in his father's life time an advancement, not only sufficient to debar him of his customary part, but so large as to extend into, or to overbalance, what would be his proportionable share also of the deadman's part; whether in this case such child shall receive any share of the deadman's part, unless he will bring over into hotchpot in the said deadman's part, so much of his said advancement, as exceedeth his just proportion of the customary part. And concerning this, the opinions of learned men are various. Some hold, if a child is fully advanced, so as that his advancement doth exceed not only what would be his just proportion of the customary part, but of the deadman's part likewise; that in such case he is excluded from any further share whatsoever of his father's personal estate, either by the custom, or by the statute. Others are of opinion, that whatsoever his advancement shall have been, so as to debar him of his customary part; yet that advancement shall have no consideration in
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the deadman's part, but thereof he shall receive his full share without any retrospect to his preceding advancement. The former opinion is more agreeable to equity and reason; but whether it is consistent with the construction of the statutes, is the question. For this is a point respecting not the custom, but the acts of parliament: the custom itself in this case is clear enough; but it is questioned, how far the statutes do infringe the custom in this particular.

Before the statute of the 22 & 23 C. 2. the custom was this: The children received their own customary part, and no more; and of this customary part a child fully advanced could have no share, the advancement being esteemed as a satisfaction for his filial portion: And no child could sue for any share of the deadman's part; the same (according to its original institution) being to be disposed for the soul of the deceased. This statute left the custom intire. And the statute of the 1 Jac. 2. c. 17. doth not touch thereupon, further than to distribute the said deadman's part. Nevertheless, in such distribution it is required, that the children (exclusive of the heir at law as aforesaid) shall bring their respective advancements into hotchpot. But in this case, the advancement is supposed to be already sunk in the customary part; and consequently nothing remaineth to be brought over into the deadman's part: And therefore (upon this supposition) a child, how largely soever advanced by his father in his life time, shall only thereby be excluded from receiving any further filial portion by the custom, but shall not be excluded from receiving a full distributive share of the deadman's part by the statute.

And with this seemeth to accord the case of *Gudgeon* and *Ramsden*, T. 1692. which was thus: The intestate, being an inhabitant in the province of York, left issue a son and daughter only, and no widow. The daughter had a portion given her in marriage, in lieu and full satisfaction of what she might claim by the custom of the province. The son was also advanced, by a settlement of lands. The question was, How this estate should be distributed. For the heir it was insisted, that now the custom of the province of York is to be quite laid out of the case, and the same distribution made of the estate, as of any other intestate's estate, and by consequence the daughter to bring her portion into hotchpot; but the heir to have a full share, without regard to what lands had been settled upon him. By the court: The daughter must not bring back her portion into hotchpot; for that came in lieu of the customary part, and was as the price the father thought fit to give her for the same. 2 Vern. 274.

But here it seemeth, that a distinction ought to be made, between an advancement given and accepted expressly in lieu and satisfaction of the filial portion, and an advancement given generally without any such agreement or stipulation. In the former case it seemeth, that no respect shall be had of such advancement in the distribution of the deadman's part, the same being to be considered not so properly an advancement by the father, as a purchase by the child: and which, by possibility, might have fallen short of, as well as exceeded, the true value of the child's portion.

portion *. And upon this principle, the said case of *Gudgeon* and *Ramsden* seemeth to have been determined. But where there is no such special contract or agreement, but the advancement is general, without any particular respect either to the customary or distributive share; it seemeth, that the same shall be applied either to one or both of them, according to the amount of such advancement, and so as best to answer the intent of the statute, which expresseth, that *the estate of all the said children shall be made equal as near as can be estimated*. And by this distinction, the two contrary opinions seem to be reconciled.

Of his clear moveable goods] Where the wife or children ought to have a rateable part of the goods of the deceased, be it a third part or half, as the case yieldeth; there also they ought to have a like part of the *debts* due unto the intestate, after they be recovered by the administrator; for then they are numbred or accounted amongst the goods of the intestate, but not before. *Swin. 221.*

But of *leases* (*Swinburne* says) the wife and children cannot have any rateable part within the province of York, or other places where they have been accustomed to have their rateable part of the moveable goods and debts recovered, unless the said wife or children, demanding their rateable part of leases, do prove that by special custom of that place (namely, of that city, county, deanry, or parish where the intestate dwelled, and had such leases) the wives and children were accustomed to have their rateable part, as well of the leases, as of the moveable goods of the intestate; which special custom being proved, they may recover the rateable part as before. (But not by the general custom of the province.) *Swin. 221.*

* For a child of age, for a valuable consideration, might release his future filial portion. Of which kind of release there seems to have been a special precise form; according to the following example, which is brief, and yet full withal and comprehensive; much in the style and manner of those most accurate forms of composition, the writs in the register: viz. "*Be it known unto all men by these presents, That I Thomas Whitehead of Byebeck in the county of Westmorland, husbandman, for and in consideration of a sum of money, by Richard Whitehead my father of Byebeck aforesaid in the said county, yeoman, to me well and truly contented and paid, have remised, released, and quit claimed, and by these presents do absolutely remit, release, and quit claim, unto the said Richard Whitehead my father, his executors and administrators, all manner of filial or child's portion of goods, which I the said Thomas, my executors or assigns can or may hereafter have, claim, or demand of, in, and to the goods or chattels of the said Richard Whitehead, by any manner of ways, means, title, or claim howsoever. In witness whereof, I the said Thomas Whitehead have hereunto set my seal, the first day of May, in the eighth year of the reign of our sovereign lord James, by the grace of God, king of England, France, and Ireland, defender of the faith, and so forth, and of Scotland the forty third. 1610.*

*Sealed and delivered
in the presence of us*

George Sharp.

Edward Brantbwaite.

Thomas Potter.

Philip Winsler.

Thomas Whitehead."

And here it is observable, that the particular sum, which was the consideration, is not specified; so that there is no room here to dispute about the *quantum* of the advancement; for it must be taken in such case as an advancement *in toto*.

But concerning estates *pur autre vie*, that is to say, estates held by lease during the life of another person, it is specially provided by the statute of the 14 G. 2. c. 20. that where there is no devise thereof, they shall go and be distributed in the same manner as the personal estate of the intestate.

Unless such child be heir to his father deceased] Which limitation is diversely extended: As,

(1) Not only the heir of lands holden in fee simple, is thereby barred from the recovery of a filial portion; but he also that is heir in fee tail, either general or special. *Swin. 231.*

(2) Albeit the lands be of very small revenue, peradventure not past a noble yearly rent, and the goods very great in comparison of so small a rent (be it 1000l or more); even in this case, the heir is barred from the hope of a filial portion. And tho' this may seem hard to the heir, if we consider that same right of primogeniture; yet if we shall consider on the other side, that if the lands be worth 1000l a year, and the goods little or nothing worth (the debts being paid), and so little or nothing left to the rest of the children (which case is more frequent than the former); the custom, we see, is not void of equity, when both cases are equally balanced. *Swin. 232.*

(3) Not only that heir is excluded from a filial portion, which doth enter upon the lands immediately after his father's death, but he also which is heir in reversion, is heir: and being heir, can have no filial portion. For in the writ *de rationabili parte bonorum*, it is contained, that he which demandeth a filial portion *neither is heir, nor was advanced in the life of his father*: now he that is heir in reversion cannot say so, and therefore can recover no filial portion, according to the custom of the country. Otherwise, if he should recover a portion, and the land afterwards; the final intent of the custom should suffer prejudice, which would that the lands and goods should not go both one way, but the one to the heir, and the other to the rest of the children. And yet the case may fall out very hard with the heir in reversion: for what if he should die in the mean time, before he could lawfully enter to those lands which be his only in reversion, and so reap no benefit either of his father's lands or goods? howsoever it shall fall out, he must be content with his lot; and tho' not he, yet his shall enjoy the land at the time appointed. *Swin. 232.*

(4) Albeit the heir receiveth the lands by settlement made upon his father's marriage; yet he is heir so as to be excluded thereby from a filial portion. As in the case of *Constable and Constable, T. 1700.* Upon a former hearing of this cause, a question arising upon the custom of the province of York, touching the distribution of the personal estate of the father; an issue was directed to be tried at law, whether the father having by settlement on his marriage settled his real estate to himself for life, part to his wife for her jointure, and the remainder of the whole to his *first* and other sons in tail, remainder to his own right heirs, the eldest son was thereby excluded by the custom of the province of York, from having any share of his father's personal estate; and it being found that he was thereby debarred and excluded, and the cause coming

coming now to be heard on the equity reserved, it was decreed accordingly. 2 Vern. 375.

(5) Albeit the heir hold lands by deed or feoffment in mortgage, or with clause of redemption, that is to say, upon condition that if the feoffor pay unto him a sum of money at a certain day, that then the feoffor may re-enter, and the deed or grant to be void; yet nevertheless in the mean time, until the condition be performed, and the land redeemed, if he should demand any filial portion, he is barred, because as yet he is heir to the deceased. But if the lands should be redeemed, and the money satisfied, then it is thought that he may recover a filial portion; because then he is not heir to the deceased, nor the advancement certain which was made by the father in his life time. Swin. 232.

(6) Likewise if a man purchase lands in fee, and by will devise the same lands to his eldest son and to the heirs of his body, and for default of such issue to his younger son and to the heirs of his body, and so on; in this case, Swinburne says, the eldest son is not barred from the recovery of a filial portion, as heir to the deceased; because he is not as heir to his father according to the course of the common law, but according to his father's will. Swin. 232. [But whether this devise shall bar him as an advancement is another question, which will be considered afterwards.]

But where a man is heir at law of lands in fee simple, and his father also deviseth those lands to him; it seemeth that he shall take by his better title, as heir at law, and not as devisee: and consequently thereby shall be excluded from a filial portion. For no man can by his will make his heir a purchaser of a fee simple; for the descent and will take effect at the same time, and the elder title shall be preferred.

(7) In like manner, the youngest son, who is heir in *borough english*, seemeth not to be heir, so as thereby to be debarred from a filial portion; for he is not heir according to the course of the common law, but by a particular custom.

(8) Note also, that if the child should have any *copyhold* land, after his father's death; in this case he is not reputed his father's heir to the effect aforesaid, and so barred from the recovery of a filial portion, due by the general custom of the said province. Swin. 232.

Note, the word *copyhold*, altho' of itself it conveys an idea distinct enough, yet from the different acceptation of it amongst learned men, it becometh equivocal; some using it to signify all lands which are not freehold; others, more properly, lands only which are holden by copy of court roll. It is of very much importance to determine in which of the two senses it is here to be understood. For a great part of the lands within the province of York are neither freehold nor copyhold, but are included under the word *customary*.

For *customary* is the general denomination of lands holden by the custom of the manor; of which, *copyhold* is but one species: so that altho' all copyhold lands are customary, yet all customary lands are not copyhold. And it seemeth that the word *copyhold* here shall be understood in the less proper sense, so as to signify, that *customary* lands in general as well as those which

are strictly *copyhold*, inherited from the father, shall be no hindrance to the child from obtaining a filial portion. For at the time when this custom of the province of York took place, these customary lands were not inheritable.

Or were advanced by his father in his life time] Here it comes to be considered, what manner of preferment or advancement that is, which doth debar the child from a filial portion.

By his father] For if another than the father bestow any preferment or advancement, tho' never so much; this preferment by another is no bar to the child, from the recovery of the filial portion of his father's goods: much less, where the child hath advanced his estate by his own industry. *Swin. 233.*

In his life time] Here the case aforesaid is considerable, where the father by his last will deviseth lands to his son (for this he may well do, and yet nevertheless die intestate as to his goods), whether this shall be such an advancement as shall debar the son from the recovery of his filial portion; and it seemeth that it shall not: for this was no advancement to the child in the life time of his father; but he may refuse or wave the bequest, and recover a filial portion due according to the custom of the country. *Swin. 233.*

Howbeit, if the father in his life time bestow a lease upon his child, or grant unto him an annuity for life out of his lands, yet in such manner as the child shall not reap any benefit thereby, so long as the father liveth, but after his death; this is holden for a preferment or an advancement, because it was assured unto him in his father's life time. Nor is this case contrary to the former; for the child had no assurance of his devise until his father was dead, because he might have revoked the same at any time whilst he lived; which he could not do in the other case. *Swin. 233.*

That the father in his life time bestowed upon his child] For if the father bestow any thing upon another for his child's sake, or for the good of his child; nevertheless this is no such preferment as will hinder the child of his filial portion. *Swin. 233.*

And therefore if the father bestow any thing upon a man of trade, to take his son for an apprentice, and to teach him his mystery; this is no advancement to the effect aforesaid. *Swin. 233.*

Or if he bestow any thing upon a schoolmaster, or tutor in the university, for the increase of his knowledge in learning, or for any degree there to be obtained; this is no advancement to exclude the child of a filial portion. *Swin. 233.*

No more is it (saith Swinburne) if the father buy the advowson of an ecclesiastical benefice or dignity, and afterwards present his son thereto. *Swin. 233.*

So if the father buy an office, and bestow it upon his son; this seemeth (he says) not to be an advancement to bar him of his portion. *Swin. 233.*

Or if the son be much indebted, and the father discharge the debt; yet this seemeth not to be a preferment. *Swin. 233.*

But if the father bestow a competent portion with his daughter in marriage, upon him that shall marry her; this, without question, is such an advancement as will bar her from the demand of a filial portion. *Swin. 233.*

A competent portion] By the word *portion* is to be understood, not only a sum of money, or part of the father's goods and chattels, but also lands and annuities, bestowed by the father upon the son. *Swin. 234.*

Competent] Competent signifieth equal, or not far inferior, to that quantity, which otherwise according to the custom of the province, should fall to be due to the child, after the rate and proportion of the father's estate, at the time when he doth bestow any such thing upon his child; for the same being equal, or not much under the rate which should belong to the child by the custom aforesaid, if his father had then died, shall stand for a sufficient preferment and advancement, to exclude him from a filial portion. For considering the equality, or small inequality, betwixt the one and the other; it is to be presumed, that it was the father's purpose, that the one should stand instead of the other. Inasmuch that if the father after this preferment should live many years, and increase his substance; yet it seemeth, that the father's former gift would bar the child from recovery of any farther filial portion: and the reason is, because as the father did grow richer (in which case the son's preferment should be less), so it might fall out that the father might have grown poorer, and then the son's preferment should have been more than otherwise it would by the custom of the country. So that the father's gift being at the first competent, in regard of his estate at that time; the same is not made effectual or ineffectual by the increase or decrease of his future estate. *Swin. 233, 234.*

But if the father's gift were not competent, or far under the rate of that which otherwise should belong to the child by the custom; as, for instance, if the father should give his child 5l to put in his purse or bestow at his pleasure, whereas otherwise his filial portion would extend to divers hundreds; this gift of the father doth not seem to be such an advancement, as will exclude the child from his filial portion, neither in the construction of law, nor in the intention of the father; and that is rather to be termed a mere benevolence, than a preferment or advancement exclusive of a filial portion: and if the son have deserved a good turn at his father's hands, this is no advancement, but a recompence of that which was formerly deserved. *Swin. 234.*

But here ariseth a question; what if the thing which the father bestoweth upon the child, be so indifferent between competent and incompetent, that it may be justly doubted whether the same shall stand for an advancement, or a mere benevolence, over and besides which, he might expect a filial portion? Now whether may the child cast in that gift of the father, and so recover an equal portion with the rest of his brethren and sisters? It seemeth at the first that he may. For if a man seised of thirty acres of land in fee simple, have issue two daughters, and giveth with one of them in marriage ten acres of the same land in frank marriage, and dieth seised of the other twenty acres; she that is thus married may (if she will)

will) have part of the twenty acres, whereof her father died seised; but then she must put her land given in frank marriage in hotchpot, that is to say, she must refuse to take the sole profits of the land given in frank marriage, and suffer the land to be commixed and mingled together with the other land whereof her father died seised, so that an equal division be made of the whole, betwixt her and her sister; and thus, for her ten acres, she shall have fifteen; whereas otherwise, her sister shall have the twenty acres of which their father died seised. And as in lands, so in goods: which is also agreeable to the civil law. And Swinburne says, he hath seen it sometimes so observed, by the consent of the children not advanced, being then of lawful years; but he hath not known it at any time so overruled by law, without their consents. And therefore he concludeth, that considering the strictness of the writ *de rationabili parte bonorum*, this gift of the father shall either be found to be a preferment or not; if it shall be found to be a preferment, then is the child excluded from recovery of a filial portion; if it shall be found not to be a preferment, then may the child recover the filial portion according to the custom of the province of York, as in the said writ is contained. *Swin. 235.*

But nevertheless, the words of the writ do not seem necessarily to infer this consequence, being only general, that *children not promoted in their father's life time ought to have their reasonable part*: for this they may have, and yet notwithstanding be required to bring into hotchpot with their brothers and sisters what they shall have received less than their due proportion; and it will be so much the more *reasonable* upon that account. And therefore what Swinburne intimates was in his days recommended to the parties by the judge, seemeth, at least since that time, generally to have prevailed as the custom of the province; that children (exclusive of the heir at law) not advanced to their full proportion of the childrens part, shall be admitted to come in for their share of the said childrens part, bringing therein to their partial advancements into hotchpot: agreeable to what Swinburne acknowledgeth to be the rule of the civil law; in conformity also to the custom of the city of London, and to the measures of the statute of distribution, and to the rules observed by the courts of equity in all such like cases.

Whereon to live] If the father bestow any thing upon his child to any other end, as money in his purse to spend among his equals, or to buy him suits of apparel, or books, or armour for the service of his country; yet this (as it seemeth) is not to be holden for an advancement, tho' peradventure the sums of money given for these particular ends, were not very much inferior to that which otherwise might belong to the child for his filial portion according to the custom, and otherwise would have been taken for an advancement: but it must be a provision of some competent thing for the maintenance of his child, whereby he may be the better enabled to live after his father's death. *Swin. 234.*

It is said by the editors or continuators of Swinburne, that it hath been much controverted, whether the ordinary hath power to compel the administrator

ministrator to give portions to children, or to allot and distribute filial portions to the deceased's children out of his estate. If the ordinary attempt this, either before or after the granting of letters of administration, it hath been held, that the administrator might have a prohibition; and that the ordinary hath not any power to make distribution of the surplusage, nor to take any bond to answer the same: for that if the ordinary might distribute, then the administrator might be charged of his own goods; for there may be dormant debts, and which are unknown: yet notwithstanding, they add, that it is usual for the ordinary to order and allot distribution of filial portions, and therein prohibitions are not often granted. *Swin. 233. a.*

But whether this is spoken of the times before the statute of distribution, doth not appear. As to the deadman's part, there seemeth to be no doubt, but the ordinary by the said statute may cause distribution thereof. And as to the widows and childrens portions, the statute provides that the custom shall be observed as before: And it seemeth that the ordinaries within the said province, even as all other ordinaries, before the making of the said act, did exercise a power of compelling distribution, altho' the temporal courts would not allow the same to be lawful, and that was the cause of the act being made. And the act says, that "*All ordinaries, as well the judges of the prerogative courts of Canterbury and York, as other ordinaries, shall have power to order and make just and equal distribution.*"

There is a case in 2 *Vern. 47. 82.* wherein the customs of the city of London and of the province of York did interfere; which was thus: *E. 1688. Chomley and Chomley.* A freeman of London died within the province of York, leaving a widow, and issue two sons and a daughter; and an estate of about 50 l a year within the province of York descended on the elder son; and if the custom of the province of York should prevail, he would thereby be excluded from having any share of the personalty, which was about 20000 l. A bill was brought for the direction of the court, how and in what manner the personal estate should be disposed of. And the court was clearly of opinion, that the deceased being a freeman of London, the custom of the city for the distribution of the personalty should prevail and controll the custom of the province of York; and that, notwithstanding the custom of the province to the contrary, the heir should come in for a share of the personal estate: for the custom of the province is only local, and circumscribed to a certain place; but that of London follows the person, tho' never so remote from the city.

UPON the whole, so far as can be estimated from the premises, the course of distribution of intestates effects within the province of York seemeth to stand thus:

1. If a person dieth intestate, leaving no wife, but *an only child*; which child is *heir at law*, or *advanced*, or *partly advanced*, or *not advanced*: In all these cases, it maketh no difference; for one way or other such child shall have the whole clear personal estate. For supposing such child

child to be *heir at law* ; he shall have nothing by the custom, but by the statute he shall have the whole as next of kindred. If he is *advanced* ; he shall likewise have nothing by the custom, but by the statute in like manner he shall have the whole. If he is *partly advanced* ; he shall have one half by the custom, there being no other child with whom to bring his partial advancement into hotchpot ; and the other half by the statute. So in like manner, if he is *not at all advanced* ; he shall have one half by the custom, and the other half by the statute.

2. If such person hath *divers children* ; *one of whom is heir at law, and the others are advanced*. In this case, with respect to the custom, it is as if he had no children : none of them can claim any thing by the custom ; and (the younger children being supposed to be fully advanced), the heir at law by the statute shall have the whole.

3. If such person hath *divers children, the first of which is heir at law, the second advanced, the third partly advanced, and the fourth not advanced* : In this case, the child *partly advanced*, and the child *not advanced* shall have one half equally betwixt them by the custom, the child partly advanced first thereunto bringing his partial advancement into hotchpot ; and the other half (which is the deadman's part) shall be distributed by the statute, equally amongst all the said children (the second only excepted, who is supposed to be fully advanced already) share and share alike. But if the heir at law hath been advanced by his father, otherwise than by lands or as heir at law ; he shall bring such his advancement into hotchpot with his brothers and sisters, otherwise he shall have no distributive share by the statute.

And note, that the representatives of children dead are admitted by the statute to a distributive share of the deadman's part in the place of the deceased child or children whom they represent ; but not so of the customary part, by the custom.

4. If a man hath *a wife and no child* ; she shall have (besides her convenient bed and apparel) one half by the custom, and the other half (being the deadman's part) shall be distributed by the statute ; of which deadman's part by the said statute she shall have one half, and the other half shall go to the next of kindred to the deceased in equal degree : So that dividing the same into four ; she shall have three, and they shall have one.

But if altho' there be no child, yet there hath been a child, and there are any legal representatives of such child deceased ; then of the deadman's part by the said statute the wife shall have but one third, and the said representatives shall have the other two thirds : So that dividing the whole into six parts, she shall have four and they shall have two.

5. If a man hath *a wife and also a child or children, one of which children is heir at law, and the others are advanced* : In this case, with respect to the custom, it is the same as if he had no child ; and consequently the wife shall have one half by the custom, and the other half (being the deadman's part) shall be distributed by the statute : of which deadman's part by the said statute she shall have one third, and the other two thirds shall go

go to the heir at law as aforefaid : So that dividing the whole into fix parts, ſhe ſhall have four and he ſhall have two.

6. If a man hath a wife and alſo a child or children, any one or more of which children are not advanced : by the cuſtom ſhe ſhall have one third part, and the children not advanced ſhall have another third part, and the remaining third part (being the deadman's part) ſhall be diſtributed by the ſtatute ; of which deadman's part by the ſaid ſtatute ſhe ſhall have one third, and the other two thirds ſhall be diſtributed amongſt the children in manner as is aforeſaid : ſo that dividing the whole into nine, ſhe ſhall have four and they ſhall have five.

As for example : A man inhabiting within the province of York dieth inteſtate, leaving a clear perſonalty of 9000 l ; and leaving a widow, and four children ; the firſt being heir at law to freehold lands, and having received likewiſe of his father in his life time 400 l to ſet him up in trade ; the ſecond advanced, to the amount of 3000 l ; the third partly advanced, to the amount of 600 l ; and the fourth not at all advanced. The queſtion is, How this perſonalty ſhall be diſtributed ? Firſt of all, The widow ſhall have one third part by the cuſtom, as her widow's portion, to wit, 3000 l. Another third part, by the ſaid cuſtom, ſhall be diſtributed amongſt the children ; of which, the heir at law (as ſuch) by the ſaid cuſtom is excluded from receiving any ſhare ; the ſecond ſon alſo, as being fully advanced, is excluded ; but hereunto the third ſon ſhall bring his partial advancement of 600 l into hotchpot, and then the third and fourth ſons ſhall divide the 3600 l equally between them ; but the real benefit thereof to the third ſon will be but 1200 l, and to the fourth ſon 1800 l. The remaining third part of the ſaid perſonalty, which is the deadman's part, ſhall be diſtributed by the ſtatute ; of which, by the ſaid ſtatute, the widow ſhall have one third, to wit, 1000 l ; and the reſidue, being 2000 l, ſhall be diſtributed equally amongſt the ſaid three children, namely, the heir at law and the third and fourth ſons (the heir at law being let in for ſo much by the ſtatute ; and the ſecond ſon being ſtill excluded, as having received more than his juſt proportion of his father's whole perſonal eſtate) ; but hereunto the heir at law ſhall firſt bring his partial advancement of 400 l into hotchpot, and ſo the ſaid three children ſhall divide the whole 2400 l equally amongſt them ; but the real benefit thereof to the heir at law will be but 400 l, and to the ſaid two youngeſt children 800 l each. So that of the whole clear perſonalty of 9000 l, the widow ſhall receive

—	—	—	—	4000 l
The heir at law	—	—	—	400 l
The ſecond child	—	—	—	000 l
The third child	—	—	—	2000 l
The fourth child	—	—	—	2600 l

Total 9000 l.

7. If a perſon dieth inteſtate, leaving neither wife nor child, but a father living ; the ſame is out of the cuſtom, and (ſuppoſing there is no repreſentative of any child deceaſed) then the father, by the ſtatute, as next of kindred, ſhall have the whole.

Wills. Distribution.

But if, altho' there be no child, yet there hath been a child, and such child deceased hath left any child or other descendent; then such representative of the child deceased shall receive the whole, in exclusion of the father.

8. If the deceased leaveth *neither wife nor child (nor representative of such child as aforesaid), nor father, but a mother living*; the same also is out of the custom, and by the statute of the 1 J. 2. c. 17. every brother and sister, and the representatives of them, shall have an equal share with the mother: if there be no brother nor sister, nor representative of any of them, then by the statute of distribution the mother shall have the whole, as next of kindred.

9. If the deceased leaveth *neither wife, nor child (nor representative of such child as aforesaid), nor father, nor mother; but leaveth brothers and sisters, and children of other brothers and sisters deceased*; this case also is out of the custom; and by the statute, the brothers and sisters, and the children of the brothers and sisters deceased, shall take *per stirpes*, and not *per capita*; for the children of the deceased, being not equal in degree with their uncles and aunts, do take in this case not in their own right, but by way of representation of their parents deceased.

10. But if a person dieth intestate leaving *neither wife, nor child (nor representative of such child as aforesaid), nor father, nor mother, nor brother, nor sister, but children of brothers and sisters*; in this case by the statute they shall all take equally *per capita* and not *per stirpes*, because they do not come in by the right of representation, but all as next of kindred in equal degree.

11. If a person dieth intestate leaving *neither wife nor child, nor representative of such child, nor father nor mother, nor brother nor sister, nor representative of brother or sister, but hath a grandfather or grandmother living*; such grandfather or grandmother shall come in before uncles and aunts by the statute, as next of kindred to the deceased.

12. If a person dieth intestate leaving *neither wife nor child, nor representative of such child, nor father nor mother, nor brother nor sister, nor representative of brother or sister, nor grandfather nor grandmother, but uncles or aunts, and children of uncles or aunts deceased*: These children are amongst collaterals, and out of the statute in the right of representation, and shall take nothing; but the surviving uncles and aunts shall have the whole as next of kindred.

13. If a person dieth intestate leaving *none of these relations*; the general rule by the statute is, that the same shall go to the next of kindred in equal degree.

14. If such person hath *no kindred*, it is out both of the custom and the statute; and the same shall escheat to the king, or to the lord of the manor or other to whom the king hath granted it: for where no person can claim any property, there the king shall be intitled by his prerogative.

v. *Of the custom within the principality of Wales.*

By the 27 H. 8. c. 26. whereby lands and other hereditaments within the principality and dominion of Wales, were made to be inheritable after the manner of the english tenure, it is provided nevertheless, that *lands tenements and hereditaments, lying within the said principality and dominion, which have been used time out of mind, by the laudable customs of the country, to be departed and departable amongst issues and heirs male, shall so continue and be used, in like form fashion and condition, as if this act had never been made.*

And this is to be understood, as it seemeth, of the lands in those parts of Wales, where the conqueror never came.

But by the 34 & 35 H. 8. c. 26. *All lands tenements and hereditaments within the dominion of Wales, shall be taken used and holden as english tenure, to all intents, according to the common laws of England; and shall not be partable among heirs male after the custom of gavelkind, as heretofore in divers parts of Wales hath been used and accustomed.* (In like manner as gavelkind lands in Kent had been disgavelled by the statute of the 31 H. 8. c. 3. and a private statute made in the 2 & 3 Ed. 6.)

And by the 7 & 8 W. c. 38. it is enacted as followeth: *Whereas in several counties and places within the principality of Wales and marches thereof, the widows and younger children of persons dying inhabitants therein have often claimed and pretended to be intitled to a part of the goods and chattels of their late husbands or fathers, called their reasonable part, by virtue of a custom or other usage, notwithstanding any disposition of the same by their husbands and fathers last wills and testaments, or by deed in their life time, and notwithstanding a competent jointure made for the livelihood of the said widows, whereby great troubles disputes and expences concerning such custom have been occasioned; for remedy thereof, it is enacted, that it shall be lawful for any person inhabiting or residing, or who shall have any goods or chattels within the principality of Wales or the marches thereof, by their last wills and testaments to give bequeath and dispose of all and singular their goods chattels debts and other personal estate to their executors or to such other persons as they shall think fit, in as large and ample manner as by the laws and statutes of this realm any person may give and dispose of the same within any other part of the province of Canterbury or elsewhere; and that the widows, children, and other the kindred of such testator, shall be barred to claim or demand any part of the goods chattels or other personal estate of such testator, in any other manner than as by the said last wills and testaments is limited and appointed; any law, statute, custom, or usage to the contrary notwithstanding. f. 1.*

Provided, that nothing in this act shall extend to take away any right or title which any woman now married, or younger children now born, may have to the reasonable part of their husband's or father's estate, by virtue or colour of the said custom or usage f. 2.

VIII. Account.

Executor's
oath to ac-
count.

1. **I**T is for the most part every where within this realm observed, that the executors promise to the ordinary by their oath, to make a true and perfect account, whensoever they shall be thereunto called by the said ordinary. *Swin. 466, 467.*

And in the province of York, it is usual for the executor to give bond also to the like purpose.

Administra-
tor's bond to
account.

2. By the statute of the 22 & 23 C. 2. c. 10. *The administrator shall give bond to make or cause to be made a true and just account of his administration, at a day in such bond to be expressed; and all the residue of the goods chattels and credits which shall be found and remaining upon the said administrator's account, the same being first examined and allowed of by the ecclesiastical judge or judges for the time being, to deliver and pay unto such person or persons respectively, as the said judge or judges by his or their decree or sentence shall limit and appoint.*

Before whom
the account
shall be.

3. An account must be passed before the same judge, or his surrogate or successor, that grants the administration: By Dr. Bettesworth. *Floy. 37.*

Ordinary's
power to
compel the
executor.

4. Dr. Swinburne says, Albeit it seemeth, that the executor is not tied to make an account to the legataries or creditors extrajudicially; yet he supposeth that at the instance or promotion of such legataries and creditors, he may be compelled to render an account to the ordinary judicially. *Swin. 466.*

But that an executor may exact an account of his co-executor extrajudicially, but not in judgment [that is, in the spiritual court;] but the ordinary may call them both, or either of them, to a judicial account. *Swin. 466.*

Ordinary's
power to
compel the
administrator.

5. By the statute of the 31 Ed. 3. ft. 1. c. 11. *In case where a man dieth intestate, the ordinary shall depute the next and most lawful friends of the deceased person to administer his goods; which deputies shall have an action to demand and recover as executors the debts due to the person intestate in the king's court, for to administer and dispend for the soul of the dead; and shall answer also in the king's court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as the time to come.*

And by the statute of the 22 & 23 C. 2. c. 10. *The ordinaries shall and may proceed and call administrators to account, for and touching the goods of any person dying intestate; and upon hearing and due consideration thereof, order and make just and equal distribution of what remaineth clear (after all debts, funerals, and just expences of every sort first allowed and deducted); and the same distributions decree and settle, and compel such administrators to observe and pay the same by the due course of his majesty's ecclesiastical laws: saving to every one supposing him or themselves aggrieved, their right of appeal, as was always in such cases used.*

But by the statute of the 1 J. 2. c. 17. it is provided, that no administrator shall be cited according to the said act of the 22 & 23 C. 2. c. 10. to
6 render

render an account of the personal estate of his intestate (otherwise than by an inventory or inventories thereof) unless it be at the instance or prosecution of some person in behalf of a minor, or having a demand out of such personal estate as a creditor or next of kin, nor be compellable to account before any the ordinaries or judges by the said act impowered and appointed to take the same, otherwise than as is aforesaid, any thing in the said act to the contrary notwithstanding. f. 6.

6. The creditors to whom the testator did owe any thing, and the legataries to whom the testator did bequeath any thing, and all others having interest, are to be cited to be present at the making of the account; otherwise the account made in their absence, and they never called, is not prejudicial unto them. *Swin.* 468.

Parties interested to have notice.

And forasmuch as proofs made upon the account, at the instance of some one or more persons having interest, do not bind others who are no parties to the suit; therefore, to prevent multiplicity of actions, it behoveth the executor or administrator, when he is cited by any one of the parties to render an account, to cite the next of kindred in special, and all others in general, having or pretending to have interest in the goods of the deceased, to be present if they think fit at the rendering and passing of the account. And then, upon their appearance, or contempt in not appearing, the judge will proceed to give sentence, and the account thus determined will be final. And this is expedient to be done, whether at the instance of any party or not; because the witnesses otherwise might be dead before calling for the account; and hereby the executors or administrators of the account are freed from giving any further account, which they might not be so well able to do, because they are not supposed to have been privy to the receipts and disbursements of their testator or intestate. *1 Ought.* 354, 5, 6.

7. If any person having interest (as, for instance, the son of the deceased, a legatary, creditor, or the like) shall call the executor or administrator to exhibit a true full and perfect inventory of the goods of the deceased which have come to his hands, and to give an account of his administration thereof; he who is called in such case, is bound personally to exhibit such inventory and account, and (if the adverse party demand it) to take a corporal oath of the truth thereof; notwithstanding that at another time perhaps an inventory hath been exhibited *ex officio mero* of the judge, and in the absence of the party, and an account given upon oath. *1 Ought.* 345, 6.

Manner of passing the account

And this inventory is not to be exhibited under protestation (as when an inventory is exhibited in common form, and not at the instance of the party) but absolutely and directly, for a full true and perfect inventory of all and every the goods of the deceased, which have come to the said accountant's hands since the death of the deceased. And if he shall exhibit a false or imperfect inventory or account upon his said oath, he shall be guilty of perjury. *id.* 346.

And the adverse party shall be at liberty to disprove or object against such inventory and account. *id.* 347.

And

And he shall make due proof of every payment, that is to say, of lesser sums by his oath, and of greater sums by other proofs, such as the ordinary shall allow. *Swin.* 467.

Particularly, for sums under 40s his own general oath as aforesaid shall be allowed as sufficient; provided that there shall appear no falsehood, or fraudulent division of sums; for sometimes accountants (knowing that all such small sums will be allowed to them upon their said oath) will divide greater sums into less: But if there appear no fraud, such small sums shall be allowed to them as aforesaid, to avoid expences in proving the same, and because it is presumed that the accountant will not forswear himself for obtaining the allowance of such little matters. *1 Ought.* 347, 8.

But after the death of the executors or administrators, such lesser sums as aforesaid shall not be allowed upon the oath of their executors or administrators; for this can only be done on the oath of those who laid out the money. *id.* 347.

Expences to be allowed.

8. The executor or administrator shall be allowed all reasonable expences, as well in law suits, as for other honest purposes: and this reasonableness of expences to be such, as that he may receive thereby neither profit nor loss. *Lind.* 178.

And therefore he shall be allowed his expences in secular courts, over and above such costs as were allowed there. *Floy.* 37.

Money lost.

9. Where an executor puts out money upon a real security, which at that time there was no reason to object to, and afterwards such security proves bad; he shall not be accountable for the loss. *1 P. Will.* 141.

So if the executor pay the assets into the hands of a banker his co-executor, whom the testator used to intrust with his money; after which the banker fails: the executor shall not be chargeable with the loss. *1 P. Will.* 243.

Discharge.

10. After due examination of the account as aforesaid, the ordinary finding the same to be true and perfect, may pronounce for the validity thereof; and the executor or administrator ought to be acquitted and discharged from further molestation and suits, neither ought they to be called by the ordinary to any farther account. *Swin.* 469.

And by the statute of the 1 Ed. 6. c. 2. *All acquittances of and upon accounts made by the executors administrators or collectors of goods of any dead person, shall be made in the name and with the stile of the king, as it is in writs original or judicial at the common law: and the teste thereof shall be in the name of the archbishop or bishop or other having ecclesiastical jurisdiction.*

Costs.

11. A party praying an account, having an interest, is not to be condemned in costs; unless he object thereto, and fails in his proof. *Floy.* 38.

Whether the administration bond shall be put in suit for debts not paid.

12. *M. 35 C. 2. Brown and the archbishop of Canterbury against Willis.* An action of debt was brought upon a bond conditioned for the payment of 300l, wherein one Brown was bound to the archbishop, that the administrator of T S should truly administer, and exhibit a true inventory of the intestate's estate, and give a just account of his administration.

The

The defendant pleaded, that he had exhibited a true inventory, and given a just account. The plaintiff replied, that the intestate owed 200l to *E G* by bond, and that his goods to that value came to the administrator's hands, and assigns breach in not paying that debt. And upon a demurrer to this replication, the plaintiff had judgment. But it was reversed in the exchequer chamber; because the breach was not within the meaning of the condition of that bond. *Lutw.* 882.

H. 6 An. Archbishop of *Canterbury* and *Willis*. In debt upon a bond entred into by an administrator to the ordinary, upon taking letters of administration, the question was, Whether an administrator by virtue of this obligation was bound to go, and give in his account in the spiritual court, without being cited? And by Holt chief justice, who delivered the opinion of the court, 1. It appears by the statute of *Ed. 3.* that an executor was compellable to account before the ordinary, and so was an administrator: but that the ordinary was to take the account as given in, and could not oblige them to prove the items of it, nor swear to the truth of them. So it was if a creditor sued in the ecclesiastical court; for he had a proper remedy at common law. But if a legatee had sued for an account in the ecclesiastical court, the defendant before the statute was compellable to prove the whole account; for the legatee had no other remedy, and the ecclesiastical court which had a jurisdiction of legacies could not otherwise do right: Yet in such a case, if the executor would pay him, he could not sue farther, for he had right done him, and the executor was not liable, but of necessity that right might be done. 2. A person intitled to distribution on the 22 *C. 2.* is in consequence intitled to sue for an account as a legatee was; for the next of kin is a legatee by the statute, and as a statute-legatee shall have the same remedy as the other legatee might before the statute. The condition of an arbitration bond was, to account when required: therefore he was not to account before he was legally cited, which could not be *ex officio*; and therefore the statute of *J. 2.* whereby the ordinary is prohibited from citing him in *ex officio*, had really no effect at all, for the law was so before: But since the statute of *C. 2.* the condition of administration bonds being, that he account at a day certain, he must account accordingly at his peril, and that without citation or suit, and this account must be in court; and if he comes at the day, and no court is held, he shall be excused; for he may plead he was there ready, and no court held. But then this account is not examinable, unless a party interested comes in and controverts it. And whereas by the words of the condition he is to administer well and truly, that shall be construed in bringing in his account, and not in paying the debts of the intestate; and therefore the creditor shall not take an assignment of the bond and sue it, and assign for breach the nonpayment of a debt to him, or a *devastavit* committed by the administrator, for that would be endless, and the bond doth not extend to that. 1 *Salk.* 315, 316.

Form of an inventory.

A true and perfect inventory of all the goods, chattels, wares, and merchandises, as well moveable as not moveable, of A B late of C in the county of — and diocese of — yeoman, deceased, made by us whose names are hereunto subscribed, the — day of — in the year of our Lord —

	l	s	d
His purse and apparel	15	0	0
Horses and furniture	20	0	0
Horned cattle	27	0	0
Sleep	20	0	0
Swine	0	13	0
Poultry	0	3	4
Plate and other household goods	18	0	0
One lease of &c.	30	0	0
Rent in arrear	25	0	0
Corn growing at the time of his death	12	0	0
Hay and corn	10	0	0
Ploughs and other implements of husbandry	6	10	0
Debts	100	0	0
Total -	284	6	4

Other debts supposed to be desperate - - 25 . 2 . 6
 Debts owing by the deceased 250 l.

*Appraised by us, the day
 and year abovewritten :*

A. B.
 C. D.

Form of a will of lands.

*I A B of — in the county of — yeoman, do make this my last will :
 First, I give and devise unto C D of — all and every my messuages, lands,
 tenements, and hereditaments, with the appurtenances, whereof I am seised
 in fee, situate lying and being in — in the county of — and now or
 late in the several tenures or occupations of — and — or one of
 them, their or one of their assigns, lessees, or under-tenants ; To have and to
 hold all and every the said messuages, lands, tenements, and hereditaments,
 with the appurtenances, to him the said C D, his heirs and assigns for ever.*

*Also, I give and devise to my son G B, all that my freehold land lying in
 a field called — field, near unto — To hold unto the said G for
 term of his life, and after his decease to my granddaughter E B her heirs and
 assigns for ever.*

*Also I give and devise unto I K of — all my copyhold messuages,
 lands, tenements and hereditaments (and which I have surrendered to the use
 of*

of my will) situate lying and being at — and which now are or lately were in the several tenures or occupations of — and — or one of them, their or one of their assigns, lessees, or under tenants: To have and to hold to the said J K and to the heirs of his body lawfully begotten; and for default of such heirs, then to the right heirs of me the said A B for ever.

In witness whereof, I have hereunto set my hand and seal, the — day of — in the year of our Lord —

A B.

Signed, declared, and published, as and for his last will and testament, in the presence of us who subscribed our names as witnesses in the testator's presence, and at his request:

C. D.
F. G.
H. J.

Of Goods.

In the name of God, amen. I A B of — in the county of — yeoman, being mindful of my mortality, do this — day of — in the year of our Lord — make and publish this my last will and testament in manner following: First, I desire to be decently and privately buried in the church yard belonging to the parish in which I shall happen to die, without any funeral pomp, and with as little expence as may be; and I give and bequeath unto the poor of the same parish the sum of — to be distributed in such proportions and manner as my executrix herein after named shall think fit.

Also, I give and bequeath unto my eldest son J B, the sum of —

I give and bequeath unto my second son W B, the sum of —

Also, I give and bequeath unto my daughter M B, the sum of —

To be paid unto them respectively so soon as one year after my decease shall be expired.

Also, I do forgive unto L M the sum of — out of the principal sum of — which he owes to me upon bond.

Also, I give to my granddaughters A and B, children of my daughter C, the sum of — a piece, to be paid to them respectively at their respective ages of twenty one years, or days of marriage, which shall first happen; the same to be put out to interest at the discretion of my executrix, and the interest accruing thereof to be applied to their education and maintenance respectively, until their said respective ages or marriage. And in case either of them shall die before the age of twenty one years or marriage, then I give the share of her so dying unto the survivor of them. And if both of my said granddaughters shall happen to die before the attaining the age of twenty one years or marriage, then I give and bequeath the whole of the said several sums unto my daughter D, if she shall be then living.

Also, I give to my wife E B, during her life, the use of all my plate and household goods, bedsteads, bedding, and other furniture; and after her decease to remain to my son J B.

WILLS.

All the rest and residue of my personal estate whatsoever and wheresoever, and of what nature kind and quality soever the same may be, and not herein before given and disposed of (after payment of my debts, legacies, and funeral expences) I do give and bequeath unto my wife E B, her executors, administrators, and assigns; to and for her and their own use and benefit absolutely: And I do hereby constitute and appoint my said wife E B, sole executrix of this my last will and testament.

In witness whereof, I have hereunto set my hand and seal, the day and year first abovescribed:

A. B.

*Signed, declared, and published, as
and for his last will and testament, in
the presence of us:*

C. D.

E. F.

Of lands and goods.

In the name of God, amen. I A B of — esquire, do make and declare this my last will and testament in manner following: First, I bequeath my soul into the hands of almighty God, hoping and believing a remission of my sins, by the merits and mediation of Jesus Christ; and my body I commit to the earth to be buried at the discretion of my executor herein after named: And my worldly estate I give and devise as follows;

First, I give and devise to my younger son B B, all that my whole freehold messuage and tenement, situate lying and being at ——— To have and to hold to my said son B B, his heirs and assigns for ever.

Also, I give and devise all that my messuage and tenement, with the appurtenances, situate lying and being at ——— unto my daughter C B; To have and to hold to my said daughter C B, and her assigns, for and during the term of her natural life, without impeachment of waste; and from and immediately after her decease, I give and devise the same unto my said son B B, and the heirs of his body lawfully to be begotten; and for default of such heirs, then to my own right heirs for ever.

Also, I give and devise unto my grandson G B, all that my messuage and tenement, with the appurtenances, situate lying and being at ———, commonly called ——— tenement; To have and to hold (subject nevertheless to, and charged and chargeable with the annuity, yearly rent, or sum of ——— herein after mentioned) to him the said G B, his heirs and assigns for ever: And I do hereby give devise and bequeath unto my wife E B and her assigns, for and during the term of her natural life one annuity or clear yearly rent or sum of 60l, of lawful money of Great Britain, free of all taxes and other deductions, parliamentary or otherwise, to be issuing and payable out of the said messuage and tenement, and to be paid and payable by equal half yearly payments, at the feast of the annunciation of the blessed virgin Mary, and of St. Michael the archangel; the first payment thereof to be on such of the same feasts, as shall first and next happen after my decease; and I do hereby
charge

charge and subject the said messuage and tenement to and with the payment of the said annuity, yearly rent, or sum of 60*l* accordingly: And my will is, that in case the said annuity, or any part thereof, shall be behind or unpaid by the space of twenty days next after either of the aforesaid feasts, whereon the same is herein before directed to be paid as aforesaid (being lawfully demanded); that then and so often it shall and may be lawful for my said wife and her assigns, to enter upon the said premises charged with the said annuity as aforesaid, and distrain for the same, or for so much thereof as shall be so in arrear; and the distresses and distresses then and there found, to detain and keep, until she shall be fully paid and satisfied all such arrearages, with costs and charges in and about the making and keeping thereof. And in case the said annuity, or any part thereof, shall be behind and unpaid for the space of forty days next after any of the said days of payment, whereon the same ought to be paid as aforesaid; that then and so often it shall and may be lawful for my said wife and her assigns, into all and singular the premises, charged with the said annuity as aforesaid, to enter; and the rents, issues and profits thereof to receive and take, until she be therewith and thereby, or by the person or persons who shall be then intitled to the immediate possession of the premises, paid and satisfied the same and every part thereof; and all the arrears thereof incurred before, and that shall incur during such time as she shall receive the rents issues and profits thereof, or be intitled to receive the same by virtue of such entry to be made as aforesaid, together with her costs damages and expences laid out and sustained, by reason of the non-payment thereof, or any part thereof.

Also, I give and devise unto D F all that my messuage and tenement, with the appurtenances, which I hold by or under a lease from ———, and all my estate, right, title, term, and interest of and in the same premises, with the appurtenances; To have and to hold to him the said D F, his executors administrators and assigns, to and for his and their own use and benefit.

Also, I will and ordain, that the executor of this my last will and testament, or his executor or executors, for and towards the performance of my said testament, shall with all convenient speed after my decease, bargain sell and alien in fee simple all those my lands called ———; for the doing, executing, and perfecting finishing whereof, I do by these presents give to my said executor and his executor or executors; full power and authority to grant, alien, bargain, sell, convey and assure all the same lands called ——— to any person or persons and their heirs for ever in fee simple, by all and every such lawful ways and means in the law, as to my said executor or his executor or executors, or to his or their counsel learned in the law, shall seem fit or necessary.

And I do hereby appoint my trusty friend E E executor of this my last will and testament; and do give unto him the sum of ——— in consideration of the pains and trouble he will have in the execution of this my will.

Also, I give unto P Q of ——— the sum of one hundred pounds.

Also, I give unto R S of ——— the like sum of one hundred pounds.

Also, for the better education of my children A, B, and C; I do give and dispose of the tuition and custody of them, and every of them, unto my wife E B, for such time as they or any of them respectively continue unmarried, and under the age of one and twenty years, and my said wife remains my widow; but if my

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said wife shall die or marry, during the single life and nonage of any of my said children, then I give the custody and tuition of such of my children, so being unmarried and under the age of one and twenty years at the marriage or death of my wife, unto my said executor E E.

Also, I do hereby authorize, empower, and direct my said executor and his executor or executors, from and after my decease until the aforesaid G B shall attain his age of one and twenty years, to manage and improve the estate and fortune of him the said E G, by me hereby given him, for his use and benefit; and to lease all or any part of his freehold, copyhold, or leasehold estates, and to lend and place out upon security or securities at interest, or otherwise improve according to his or their discretion or discretions, all or any part of the monies belonging to or arising from the said estates and fortune of the said E G, and to pay unto and account with him the said E G, for all such rents, interests, produce and improvements, as shall arise from, or be made of, and produced by the said estates, monies, and fortune hereby given and devised to him, when he shall attain his age of twenty one years.

And my will is, and I do hereby expressly declare, that my said executor, his executor or executors, shall not be charged or chargeable with or accountable for more of the aforesaid monies and estates, than he or they shall actually receive, or shall come to his or their respective hands by virtue of this my will, nor with or for any loss which shall happen of the said monies or estate hereby by me given to the said E G, or of any of the aforesaid sums by me bequeathed, or of any part of my personal estate; so as such loss happen without his or their wilful default and neglect.

And also that it shall and may be lawful, for him my said executor, and his executor or executors, in the first place, out of the said premises respectively, and out of the residue of my personal estate, to deduct and reimburse him and themselves respectively, all such loss, costs, charges, and expences, as he or they shall sustain, expend or be put unto, for or by reason of the performance of this my will, or the management or execution thereof respectively, or any other thing in any wise relating thereunto.

And finally; all the rest, residue, and remainder of all my estate and effects, real and personal whatsoever, and wheresoever, not herein before otherwise effectually disposed of (after payment of my debts, legacies, and funeral expences, and other charges and deductions as aforesaid) I do give devise and bequeath unto my eldest son A B.

In witness whereof, I have hereunto set my hand and seal, the — day of — in the year of our Lord —

A. B.

Signed, declared, and published, as and for his last will and testament, in the presence of us who subscribed our names as witnesses in the testator's presence, and at his request:

C. D.
E. F.
G. H.

Codicil

Codicil.

Whereas I A B of — have made and duly executed my last will and testament in writing, bearing date — now I do hereby declare this present writing to be as a codicil to my said will, and direct the same to be annexed thereto, and taken as part thereof: And I do hereby give and bequeath to C D of — the sum of — And whereas by my said will I did give and bequeath unto E. F. the sum of — now I do hereby revoke the said legacy, and do give unto him the said E. F. the sum of — and no more. In witness whereof I the said A B have to this codicil set my hand and seal the — day of — in the year —

A. B.

Signed, declared, and published, as and for a codicil to be annexed to his last will and testament, and to be taken as part thereof, in the presence of

C. D.

E. F.

Nuncupative Will.

The last will and testament of A B of — in the county of — deceased, declared by him by word of mouth, the — day of — in the presence of us who have hereunto subscribed our names as witnesses thereof. My will is, that [here insert the very words]. In witness whereof we have hereunto set our hands the — day of — in the year —

C. D.

E. F.

G. H.

Precedents of long intails, and remainders, and contingencies, and limitations are here purposely omitted; not only because they are above the author's skill (for this he could have supplied from books of acknowledged reputation), but also and chiefly because they ought to be drawn *pro re nata*, and by the advice of counsel learned in the law. For altho' the law favours wills, yet it is when wills favour the law. The common law abhors a perpetuity; and the reason is, because if one person might indefeibly limit his estate, so also might another, and consequently by the same rule the present generation might dispose of all the lands in the kingdom for ever; which would be full of intolerable inconvenience: and therefore the law interferes, and herein checks the vanity and pride of man. And whoever shall examine the reports of cases adjudged in the high court of chancery, will observe that scarcely any thing creates to the courts of equity so much trouble, as long intails, vainly imagined to perpetuate names and families; which altho' generally drawn by the ablest advice,

Wills.

advice, yet always meet with discouragement and contradiction. For they are struggles against the bent and inclination of the law : and we may add also, against the course of providence ; which from its effects and appearances doth not seem to intend, that any thing here should be perpetual.

Witnesses. See **Evidence.**

Woollen ; burying in. See **Burial.**

A D D E N D A.

SINCE this book went to the press, some cases have been adjudged which it is thought requisite here to subjoin; together with other things proper to be noted. And the author humbly requests, as he hath travailed in many parts of the foregoing work in an unfrequented path, and consequently may have erred in several particulars, other things may have escaped his observation, and others perhaps have been out of the reach of his inquiries, that gentlemen will be so kind as to communicate their observations, and he will publish separate what shall be judged material, for the use of his subscribers.

Colleges.

To what hath been inserted at large in the body of the work, relating to colleges in the universities; it hath been judged material to add the case concerning *founder's kinsmen*. Several founders of colleges have, in their statutes for the government of the said colleges, given a certain degree of preference, in the election of scholars or others, to those of their own blood. It is contended on one side, that by length of time all relation of kindred must necessarily wear out; on the other, that this cognation still subsists, and may subsist indefinitely. On behalf of those who claim as kinsmen (altho' from the time of the foundation of the respective colleges they may be supposed to be not nearer now than the tenth, twelfth, or perhaps fifteenth degree from the common ancestor by whom they deduce their relation to the founder) it is urged, that no length of time can utterly extinguish their kindred; that no limits have ever been set to consanguinity by any law whatsoever; particularly, that by the municipal laws of this realm, in the succession to inheritances, no boundary is limited, but lands descend to the heirs of the first purchaser in infinitum; and that by the college statutes no limitation is intended, being general, in this or the like form—"Volumus, quod in omni electione scholarium, futuris temporibus facienda, principaliter et ante omnes alios, illi qui sunt vel erunt de consanguinitate nostra aut genere, si qui tales sint, ubicunque fuerint oriundi, dum tamen sint reperti habiles et idonei, secundum conditiones superius et inferius recitatas, sine aliquo probationis tempore &c. eligantur." It is contended, on the other hand, that it is absolutely necessary that some limitation should be fixed, otherwise such statute must defeat its own intention. As all collateral consanguinity consists in being derived from one common parent, if this consanguinity knows no bounds, all mankind are without doubt kinsmen, because derived from the same original ancestor. As for instance, the common stock of the founder and his nephew is the founder's father; the common stock of the founder and his cousin german is the founder's grandfather; of him and his second cousin is his great grandfather; and so on: all these are confessedly

feffedly his kinsmen, and yet all derived from different common stocks. But unless there be some period to stop at, by the same rule that the common stock may be assumed three generations above either of the related parties, it may be assumed three hundred; we may ascend to Noah, or to Adam, and make him the stirpes of universal consanguinity.—That by the civil law, all notion of consanguinity is extinguished, at the furthest after the tenth degree. Similar to which is the law of successions established by the present king of Prussia; who in his code lays it down as a rule, that “there shall no longer after the tenth degree be the least regard paid to kindred, in respect to a succession *ab intestato*, but the inheritance shall be reputed vacant, and fall to the king’s exchequer.”—That by the canon law, which regards chiefly the prohibitions of marriage, consanguinity extends no farther than the seventh degree. And as marriage with one’s kindred is prohibited generally, it was necessary to stop somewhere, or else the kindred in this, as in the college case, would be universal. For the blood of the common ancestor, wherein consists the relation, is by a multitude of descents sluiced into so many different channels, and mixed with so many other bloods, that it can be no longer distinguished. Every man has in the first ascending degree two ancestors; in the second, four; and, by the same rule of progression, in the seventh, 128; in the tenth, 1024; and in the twentieth, above a million; and has, consequently, as many bloods in him as he hath ancestors; and therefore must needs have but a very minute portion of the blood of a remote ancestor. A person, for instance, one of whose ancestors in the fifteenth degree is the founder’s father, has 32767 other ancestors in the same degree: that share of his blood therefore, which he derives from the founder’s father, is only one 32768th of his whole mass; a proportion which cannot be imagined to intitle the possessor of it to any special share of affection from the rest of the descendants of the same ancestor.—That by the municipal laws of this realm, the unlimited succession to inheritance respects only the person who is *next* of kindred, and not who is of kindred in general; and therefore the case of founder’s kinsmen is not parallel to this; for if it were, the next of kindred only could be intitled, who would exclude all the rest.—That as to the statute which requires that in every election to be made in future times, a principal regard be had to the founder’s kindred, there is in the same clause a limitation, “*si qui tales sint.*”

In the case of Winchester college, and of New college in Oxford, both of which were founded by William of Wykeham, an inconvenience arising, about 200 years after the foundation, from the growing number of founder’s kinsmen, the college of Winchester rejected a claimant. The claimant’s father thereupon applied (as the manner then was) to the court of chancery, and not to the visitor, for relief. And after a solemn hearing, 30 Jan. 22 Eliz. in the year 1579, it was recommended by the lord keeper Bromley, and assented to on all sides, for the difficulty of judgment to be given, and it was so decreed, that the plaintiff’s issue, for four descents, should be admitted *as if* they were founder’s kinsmen, and that
he

he should renounce all farther claim to the blood of the founder : which renunciation was made accordingly.

About ten years afterwards, the fathers of two other rejected candidates applied to the same tribunal for a similar relief. Whereupon the lord chancellor Hatton, "gravely considering, that the publick benefit of the realm, " for the education of scholars in learning (chiefly intended by the founder) " would greatly be hindered, if every of the children of the said complainants (allowing them to be of the undoubted blood of the founder) " should be admitted into the said colleges, being many in number, and " in a short time likely to spread and grow into more generations, sufficient " of themselves to fill the number of both colleges,"—referred the whole to bishop Cooper, who then sat in the see of Winchester, and, as such, was the visitor of both societies. The bishop, having duly considered the case, in order to shew a grateful remembrance of so worthy a work as the founding of two colleges, declares himself willing to pay a regard to such as even seem to be of the founder's blood, " so that the same tend not to " the annoying, disturbance, or prejudice of the said foundations; which " the founder undoubtedly meant to make for the publick benefit of the " whole realm, and not to be appropriated and made peculiar to one " only kindred and family." He then states the vast increase of the claimants, whereby he observes " that if it be not in wisdom foreseen, the " number of scholars in both colleges is like to be fully supplied by such " reputed kinsmen, be they apt or not apt to be brought up in learning; " so that the publick benefit intended by the founder would be frustrated." He afterwards remarks (what is equally true of every other antient college) that the revenues of the society had been much augmented by other benefactors, strangers to the founder's blood, who could never intend to confine their bounty within such a partial channel. " In consideration whereof, " and for avoiding such inconveniencies as might come, if one blood and " kindred should have both colleges in their possession and regimen," he declares the founder's intention to have been, that the education of scholars should more largely extend than to his own kindred, and yet that some convenient regard should be paid to those of his undoubted blood: and therefore the bishop directs, that there shall not be at one time above the number of 18 reputed kinsmen in the two colleges (which consist in the whole of 140 scholars) to wit, 8 in New college, and 10 in that of Winchester; and that not above two shall be admitted at any one election into either college.

At the distance of near 50 years, this matter was again reconsidered, on a petition (as it seems) to the king in person. For there is extant an order dated the 31 Jan. 1637, made by the archbishop of Canterbury, the earl of Arundel and Surry earl marshal, and the bishop of Winchester, to whom it was referred by the king to consider of the claim of another Wykeham. This they determine to be groundless: founding their opinion on the decree of the 30 Jan. 1579; and also on the great inconvenience that would follow, if the " founder's consanguinity should be so exceedingly multiplied as it would be, to the absolute restraint of the freedom of elections, " if such claims were admitted."

In the year 1651, during Cromwell's usurpation, the same question was again brought before the committee of the house of commons, for regulation of the two universities, and the colleges of Eaton and Winchester, probably with a view to re-establish the unlimited preference of kindred; but all they could obtain was, an order for augmenting the number of 18 kinsmen, established by bishop Cooper, to 20 in both societies; with a proviso, that if more than 20 had already crept in, no more should be admitted till the number was reduced to twenty.

Nevertheless, at this day, it must be acknowledged, by whatsoever means it hath happened, that tho' the annual restriction of two in the said colleges continues in use, yet the total restriction of 18 (or 20) has fallen into oblivion.

And as the limitation of *number* in the said colleges hath been attempted, so in the college of All Souls in the said university, founded by archbishop Chichele in the year 1438, it hath been endeavoured to obtain a limitation in the *degrees*; for the reasons above expressed. But in the cases that have been determined by the several visitors, no certain boundary hath been yet established; the same having been adjudged on the particular circumstances of each case. *Blackst. on Collateral Consanguinity.*

So that it seemeth still to remain a matter of great doubt. For, as on the one hand, it could never be the founder's intention to fill the college wholly with his own kindred; so, on the other, as he himself has been silent in that respect, it is difficult to say, at what precise period his particular regard to his own family and relations, however distant, should entirely cease. A limitation in point of number, seemeth to be most apposite, as was directed by bishop Cooper in the case of Wykeham's foundations, in some kind of proportion to what may be supposed, or from the registers of the respective colleges may appear, to have been in the founder's days, or within an age or two afterwards; for so the founder's whole institution will take effect: that is, far the greater part of the society will consist of persons elected out of the publick at large, or otherwise according to the restrictions of the respective foundations; and at the same time, a reasonable regard will be had to those who can prove themselves of the founder's kindred; altho' it must be owned, at this day, that the proportion is scarcely so much, as of one drop of blood to the whole mass.

There is in human nature a desire of immortality, which expands itself without limitation even in this life. Every man wishes to live in his posterity, and to transmit his inheritance to them at whatever distance. And those posterity, on the other hand, glory in deriving their pedigree thro' a long series of ancestors; and the higher they can ascend, the more honourable it is esteemed. Even that excellent author, from whom the above state of the case is taken, who argues incontestibly for the necessity of *some* limitation, yet in his dedication of the charters compliments his patron, on being "the defender of those liberties of which his ancestor attested the execution:" which attestation, was long before the foundation of any of the colleges wherein the present question is agitated. Many noble families of this kingdom boast of their descent from some of those heroes who came in with the Norman invader. The inhabitants of Wales ascend further,
into

into the Saxon period; when their progenitors chose rather to lose their country than their liberty: And they still endeavour to preserve their genealogies, altho' the reason thereof (as it seemeth) hath been long since forgotten; which most probably was, that upon their return each man might be able to deduce his title to his own estate. The Jews, for a longer term, have been solicitous to keep up the distinction of their tribes; partly, for a like reason; and partly, that they may be able to ascertain the descent of their expected Messiah. The Scots, in the time of king James the first of England, flattered that prince on his being the 108th king of Scotland lineally descended of one stock; which, according to a reasonable computation, would carry us up almost as far as the days of Solomon (the great ancestor of that monarch, as one would be tempted to conclude, from the court writings of those times).—And the more chimerical such calculations may be, so much the more they demonstrate the honourable esteem entertained thereof by mankind, where they are real.

Deans and Chapters.

VOL. I. page 470. The case of Hascard and Samany is inserted by mistake of the printer; the author, in his last corrections, having omitted the same; not being satisfied of the validity of several positions therein in point of law: particularly, where it asserts, that a number less than the major part of the whole body may execute a corporate act.

Dissenters.

MICH. 3 G. 3. The case of the king against Francis Hart. On an indictment for a libel. The prosecutrix, Miss Mary Jerom, was educated among the quakers, at the town of Nottingham; her parents, who lived there, being of that persuasion. There are several separate congregations of quakers in this town; and once a month a general assembly is held of them all. At these monthly meetings, they take into consideration the conduct of such of their members, as have not acted conformably to their rules; and proceed according to the direction of our Saviour in the 18th chapter of St. Matthew, v. 15th, 16th, and 17th*, which they call their discipline. If gentle admonitions in private have no effect, complaint is made to the monthly meeting; from whence a deputation is formally sent, to visit, and to endeavour to reclaim the party offending. And if these steps prove ineffectual, they proceed at last to a final sentence of expulsion; which is usually by some instrument or paper in writing, drawn up for that purpose, and openly read at one of the meetings for publick worship. The person employed in this service is called the clerk of the meeting; and the writing, by which the society exclude and disown as their member the

* If thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother.

But if he will not hear thee, then take with thee one or two more; that in the mouth of two or three witnesses every word may be established.

And if he shall neglect to hear them, tell it unto the church: but if he neglect to hear the church, let him be unto thee as an heathen man and a publican.

delinquent, generally sets forth the cause of their proceeding, and the fruitless care and endeavours of the society to reclaim. This has been their general practice since the toleration act; and at Nottingham, as well as in many other places, they continue on this plan to this time. The prosecutrix having acted in disobedience to their rules, by frequenting places of publick diversions, going into mourning for the death of a relation, and doing other things which they esteem unlawful: the method of admonition, and visitation by deputies, was taken by the society; and several conferences were had; but they proving ineffectual, and she absenting herself from their meetings, and declaring that she did not look upon herself as one of their body, the society at last (after several fruitless attempts to reclaim her for a year and a half) proceeded in their usual way to the sentence of expulsion, in the following words, which were reduced into writing, approved of by the monthly meeting, and afterwards read by the defendant Francis Hart, as clerk of the meeting, at the close of their meeting for worship, at Nottingham, on Sunday, Sept. 6, 1761.

“Whereas Mary Jerom, of this town, was born of parents professing the same religious principles with us, and by them educated in our society; but, not duly regarding the truth we profess, she imbibed erroneous notions contrary to scripture doctrine, and in divers parts of her conduct acted very inconsistently with a life of self denial, and of late years mostly neglected meeting for divine worship, and when visited by friends appointed by our monthly meeting in love to her soul, and in order to reclaim her from error and bring her to the acknowledgment of truth both in judgment and practice, but rejecting our labour of love she declared that she did not look upon herself as a member of our society. We therefore hereby declare her ~~not~~ in unity with nor a member of our religious society, until by unfeigned repentance she duly acknowledge scripture doctrine, and behave agreeable to our holy profession; which that she may, we sincerely desire. Signed in and by order of our monthly meeting, held at Nottingham, the fifth of the eighth month, 1761. By Francis Hart, clerk.”

The prosecutrix being acquainted with this proceeding, sent her maid servant to the defendant for a copy of this sentence; who accordingly transcribed it, and inclosed it in a cover directed to Mrs. Mary Jerom; who being thus possessed of it, annexed it to an affidavit, and applied to the court of king's bench for an information for a libel. But the court rejected the motion, and refused to grant a rule to shew cause. She afterwards, on the 12th of March 1762, preferred a bill of indictment against the defendant, for a libel, before the grand jury at the assizes held for the town of Nottingham. Which bill being found by them, was afterwards removed by certiorari into the king's bench. And the defendant having pleaded not guilty, it was tried before Mr. justice Clive, at the summer assizes held for the town of Nottingham, July 30th 1762. The evidence on the part of the prosecution was, the prosecutrix, and her servant maid who went for the paper; and the evidence of the publication of it as a libel was, the direction of it to the prosecutrix, and the defendant's acknowledgment to the maid that he read it at the meeting. The defendant's counsel called no witnesses;

witnesses ; being of opinion, that the quakers, who were the only persons that could give an account of their method of proceeding, were disabled by the statute of 7 & 8 W. c. 34. from being witnesses on a criminal prosecution ; and being restrained from arguing that the paper in question was no libel, by the judge, who said that such a question was more proper to be determined by the court above, could only insist, that the evidence on the part of the prosecution was not sufficient to maintain the indictment. The judge left the case, with its circumstances, to the jury ; but rather recommended it to them to acquit the defendant. The jury, after withdrawing about three hours, found the defendant guilty. In the Michaelmas term following, Mr. Cust moved the court of king's bench for a new trial ; and after stating the abovementioned facts, and observing upon the circumstances of hardship which would attend the case on a motion in arrest of judgment, where no facts could be relied on but what appeared in the record, and after a verdict it might be presumed that a malicious intention to defame the prosecutrix (which was charged in the indictment) was proved, insisted that the leaving such a case as this to a jury, would be inabling a jury to set up a judgment in opposition to the legislature, and overturn the toleration act, and that therefore the verdict ought to be set aside as a verdict against law. The court was clearly of opinion, that the jury should have been directed to acquit the defendant ; and, as notice of the motion was given, and counsel appeared for the prosecution, who did not contradict the abovementioned facts, the court said they would not do so much credit to such a prosecution as to grant a rule to shew cause ; and they ordered the verdict to be set aside, and a new trial to be had, on the first motion.

Marriage.

IN the title *Marriage*, where it is set forth who may or may not marry, ought to be inserted the statute of the 15 G. 2. c. 30. by which it is enacted, that if any person being found a *lunatick*, by inquisition under the great seal, or whose estate shall by act of parliament be in custody of *trustees*, shall marry ; the lord chancellor, or such trustees, may declare the marriage void.

Profaneness.

MICH. 3 G. 3. Peter Annet, convicted of blasphemy, in writing against the authority of the sacred writings, was sentenced by the court of king's bench, to suffer one month's imprisonment in Newgate ; to stand twice in the pillory, once at Charing cross, and once at the Royal Exchange ; and then to be confined in Bridewell to hard labour for one year ; and to find security for his good behaviour during the remainder of his life.

Tithes.

Nov. 8. 1762. In the exchequer. Christopher Spencer Breary, clerk, rector of Middleton upon the Wolds in the county of York, brought his bill

bill against Mr. Manby, one of his parishioners, for great and small tithes arising from the defendant's lands. The defendant by his answer insisted, that part of his farm had time out of mind been exempt from payment of tithes of any kind, or any modus or compensation in lieu thereof; and by his witnesses proved, that no tithe, modus, or compensation had within the memory of man been paid for such part of his farm. The court, at the hearing of the cause, was clearly of opinion, that the mere non-payment of tithes, tho' for time immemorial, would not be an exemption from payment of them, without setting out and establishing such exemption to have arisen from the lands having been parcel of one of the greater abbeys; and therefore decreed the defendant to account for the tithes of that part of his estate for which he claimed the said exemption.

Wills.

To what hath been observed under this title, concerning that curious but very abstruse subject, the custom of distribution of intestates effects within the province of York, it may afford some light to set forth what is the law of *Scotland* in this particular; especially as the whole kingdom of Scotland, when this custom of the province of York took place, was within and a part of that province. For which hints the author is obliged to the reverend and learned Dr. Robertson, author of the history of Scotland during the reigns of Mary and of James the sixth.—The law in that kingdom, with regard to wills, continues to this day, as it was in England within the said province before the statute of the 4 W. c. 2. viz. that the widow and children shall have a portion out of the personalty, which the husband or father cannot devise from them; and which, in both places alike, the law still gives to them in case of intestacy. And the general proportions are the same in both places; only there is some difference in distributing the childrens portion amongst themselves; wherein the Scotch regulations incline more to the principle of equality, agreeable to what is one of the chief objects of our statute of distribution. Briefly, the law of Scotland is this: If a man dies, leaving a widow, and no child; his whole clear personal estate, otherwise called *free gear*, divides into two; one half goes to the widow, the other is the *dead's part*, that is, the absolute property of the deceased, of which he can make his will, and which falls to his next of kin if he dies intestate. Where he leaves a child or children, but no widow; the children get one half as their *legitime*, legal portion, or *bairns part of gear*; the other half is the *dead's part*, which falls also to the children, if he has not otherwise disposed of it by his will. If he leaves both widow and children; the division is tripartite: the wife takes one third by herself; another falls to the children, and the remaining third is the *dead's part*. If he leaves neither wife nor child; the goods suffer no division, but all is *dead's part*.

Hitherto the customs agree. But in dividing the childrens portion amongst themselves, there is a difference: for whereas by the custom of the province of York, the heir at law, if his inheritance be never so small, is excluded from any share of the filial portion; on the contrary, in Scotland,

land, if the heir finds it his interest to renounce his exclusive claim to the inheritance, and betake himself to his share amongst the rest of the children, he may collate or communicate the inheritance with the other children, who in that case must collate the childrens portion with him; so that the whole is thrown into one mass, and divided in capita amongst all of them. Upon which ground, if there is only one child, who is heir at law; he shall receive the childrens portion: because the law admits him to come in, where there are other children, on collating his inheritance.

And for the like reason, Swinburne's notion of *advancement*, namely, that it shall be deemed either a full advancement, or else no advancement at all, so as to intitle a child either to an intire distributive share, or else wholly to exclude him, can here have no place. But in order to preserve an equality, a child who has received a provision from his father, be it more or less, shall be admitted, if he thinks it for his interest, to cast his provision into hotchpot, and receive his proportionable share of the dividend with the other children.

But if from the deed of provision, the father's intention shall evidently appear, to continue the receiver as a *bairn in the house*; the provision is interpreted to be granted as a *præcipuum*, without the necessity of collation. So also a child is not obliged to collate an estate in lands given to him by his father; because the childrens portion is not impaired by such provision.

But no filial portion is due to children foris-familiated, that is, to such as, by having renounced the filial portion, are no longer considered as *bairns of the family*, and so are excluded from any farther share of the personal estate than they have already received. But as the right of legitime, or childrens portion, is strongly founded in nature, the renunciation of it is not to be inferred by implication; neither by the child's carrying on an imployment by himself; nor by marriage; nor even by his accepting a provision from his father, unless it specially bear to be in satisfaction of his filial portion.

If he has renounced his share of the filial portion, it has the same effect in favour of the other children intitled thereto, as if he were dead; and consequently, the share of the renouncer divides among the rest: But he does not thereby lose his right to the dead's part, if he does not renounce his share in that likewise; nay, his renunciation of the filial portion, where he is the only younger child, has the effect to convert the whole subject thereof into dead's part, which will therefore fall to the renouncer himself as next of kin, if the heir be not willing to collate the inheritance with him.

Also, no legitime is due to grandchildren, upon the death of their grandfather: perhaps because the immediate father is presumed to have already received his just share out of the effects of the deceased.

And this collation, or bringing into hotchpot, takes place only amongst children: so that the widow is not obliged to collate any thing that hath been given to her by her husband, in order to increase the childrens portion; as, on the other hand, the children are not obliged to collate their provisions, in order to increase her share.

With

With regard to the deadman's testamentary part, where he makes a will, and therein appoints an executor, and doth not otherwise dispose of the said testamentary part; if the executor nominated be a stranger, that is, one who has no legal interest in the personal estate, he is merely a trustee, accountable to the next of kin, but he may retain a third of the dead's part, for his trouble in executing the testament; in payment of which, any legacy that is left to him must be computed. The heir, in like case, if he be named executor, has right to the third as a stranger. But if one be named who has an interest in the personalty, he has no allowance, unless such interest be less than a third.

As to the payment of debts; there are some which are called *privileged* debts: because they are preferable in payment to any other. Under which name are comprehended, medicines furnished to the deceased on his death bed; physicians fees in that period; funeral charges, which include whatever is necessary for the decent performance of the funeral; the rent of his house; and his servants wages, for the year or term current at his death. As to the rest; all creditors who shall, within six months after the death of the debtor, enter a legal claim, shall be preferred *pari passu* with those who have done more early diligence: which prevents collusion, and confessing of judgments, in favour of some creditors, and to the exclusion of others. (*Erskine's Law of Scotland*. Book 3. Tit. 9.)

T H E E N D.

An INDEX to the foregoing book is judged needless; the whole Work having been intended so to be framed, as to be an INDEX unto itself.

It is hoped, the like may be affirmed concerning a GLOSSARY for the explication of difficult words.

A D D E N D A

T O

BURN's Ecclesiastical Law:

W I T H

PROPER T A B L E S

A N D

I N D E X E S to the same.

L O N D O N:

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MDCCCLXV.



A D D E N D A.

IN pursuance of the author's request at the conclusion of his work, the following alterations have been suggested by his learned friends.

Apparitors.

VOL. I. p. 38. Where it is asserted, from Dr Ayliffe, that apparitors, for misbehaviour, may be removed at pleasure by the ecclesiastical judge; it seemeth that this expression requireth some limitation: because most of the apparitors, holding their office by patent, it seemeth that they may not be removed at discretion, but only suspended, for mal-practice.

Benefice.

VOL. I. p. 100. Where it is said from Rolle, that if lapse incur to the ordinary, and before the six months pass, he is translated or dieth; it seemeth that the king shall have the presentation, and not the ordinary, nor his executors, nor the guardian of the spiritualities:—The law is otherwise. For tho' it is laid down in an ancient writ, as a thing notorious, that churches which belonged to the collation of bishops while they lived, do belong to the king by reason of his custody thereof in the time of vacation; yet this relates only to such voidances as belong to the bishops in their own right: But lapses belong to the guardians of the spiritualities, whoever they be (as the same is set forth under the title *Lapse*, at page 632).

Burial.

VOL. I. p. 192. Concerning the burial of persons who have laid violent hands upon themselves, a difficulty frequently occurs to clergymen, in making the distinction, whether a person hath done it voluntarily, or from an insane mind. For tho' the words in the rubrick are very general, that persons who have *laid violent hands upon themselves* shall not have christian burial; yet it is not every kind of violent death procured to a man's self, which shall deprive him of this christian rite, but only when he hath been (as the law expresseth it) a *felon of himself*, or his own *murderer*.

The first ecclesiastical rule which hath occurred as to this matter, is the 34th canon of the first council of *Braga*, in the year 563: which forbids any burial service for those, *qui violentam sibi ipsis inferunt mortem*. But in Wilkins's Councils, Vol. I. p. 129. the fifth chapter of the 2d book of the Pœnitential of *Egbert* archbishop of *York*, written about the Year 750 (which chapter is plainly taken from the canon of *Braga*) adds this limitation, *If they do it by the instigation of the devil*. And at page 232, the fifteenth of the canons published in king *Edgar's* time, about the year 960, adds a further limitation, *If they do it "voluntarily" by the instigation of the devil*. These two authorities, *Wheatley* on the common prayer quotes from *Johnson's* collection, to prove, that our old ecclesiastical laws make no exception, in favour of those who kill themselves in distraction. But they prove, even as they stand in *Johnson*, that such were not comprehended under those laws. And accordingly, the Decretum of *Gratian*, Part 2d, Caus. 23. Qu. 5. Cap. 12. inserting the canon of *Braga*, adds to it *voluntarie*. And the note there is, *secus, si per furorem: tunc non imputaretur*.

Now we should not, without necessity, understand our own rubrick to be so much severer, than the preceding constitutions, as to place mad people in the same rank with excommunicate and unbaptized persons, and to punish a poor creature for what in him indeed was no crime.

The proper judges, whether persons who died by their own hands were out of their senses are, doubtless, the coroner's jury. The minister of the parish hath no authority to be present at viewing the body, or to summon or examine witnesses. And therefore he is neither intitled, nor able, to judge in the affair; but may well acquiesce in the publick determination, without making any private inquiry. Indeed, were he to make one, the opinion which he might form from thence, could usually be grounded only on common discourse, and bare assertion. And it cannot be justifiable to act upon these, in contradiction to the decision of a jury, after hearing witnesses upon oath. And tho' there may be reason to suppose, that the coroner's jury are frequently favourable in their judgment, in consideration of the circumstances of the deceased's family with respect to the forfeiture; and their verdict is in its own nature traversable: Yet the burial may not be delayed, until that matter upon trial

trial shall finally be determined. But on acquittal of the crime of self murder by the coroner's jury, the body in that case not being demanded by the law; it seemeth that a clergyman may and ought to admit that body to christian burial.

Cathedrals.

VOL. I. p. 203. The case of *Stainhoe* and *Owen*, mentioned there (and before at page 97), concerning the pre-election of a prebendary at St David's, before the prebend was void, seems to be somewhat misreported: The prebends are in the gift of the bishop, and therefore the election could not be to a prebend. But there are in that church six *residentiaries*; and to one of these it seemeth that the pre-election was made. Three of the residentiaries are named by the bishop, viz. the chantor, chancellor and treasurer. The other three are elective out of the body of the prebendaries. The custom had prevailed for some time, for the six to agree to elect a seventh supernumerary; who should, in return of the obligation, keep residence, and do the business of his electors, and should succeed to the next vacancy in the chapter by election. It seemeth from the abovementioned report, that Dr *Owen* having been thus pre-elected, was refused to be admitted. Upon which he moved for a mandamus; but the court would not grant the same, such pre-election being merely void. This custom at St David's, after some endeavours to be continued, hath now (it is said) intirely ceased.

Church.

VOL. I. p. 236. It hath been recommended, to set forth at large the form of consecration of churches now in use; which is as followeth:

The form of consecrating churches and churchyards (which also may be applied, *mutatis mutandis*, to the consecration of chapels and chapel-yards).

Preparations in order to the consecrating of a church.

The church is to be pewed, and furnished with a reading desk, common prayer, and great bible, and one or more surplices, as also with a pulpit and cushion, a font, and a communion table, and with linen, and vessels for the same.

The endowment, and the evidences thereof, are to be laid before the bishop or his chancellor, some time before the day appointed, in order to the preparing of the act or sentence of consecration against that day.

An intimation of the bishop's intention to consecrate the church, with the day and hour appointed for it, is to be fixed on the church door at least three days before.

A chair is to be set for the bishop on the north side of the communion table, within the rails; and another for his chancellor without the rails, on the same side.

All things are to be prepared for a communion. The church is to be kept shut, and empty, till the bishop comes, and till it be opened for his going in.

The form of consecrating a church.

If the church to be consecrated be a new church built in an old parish; then to be met by the minister of the place, the churchwardens, and some of the principal inhabitants.

The bishop is to be received at the west door, or at some other part of the church, or churchyard, which is most convenient for his entrance, by some of the principal inhabitants.

At the place where the bishop is received, a petition is to be delivered to him by some one of the persons who receive him, praying that he will consecrate the church.

The petition is to be read by the register.

The bishop, his chaplains, the preacher, and the minister who is to read divine service, together with the rest of the clergy, if any other be present, enter the church, and repair to the vestry, or (if there be no vestry) to some convenient part of the church, where, as many as are to officiate put on their several habits; during which time, the parishioners are to repair to their seats, and the middle ile is to be kept clear.

As soon as the church is quiet, the bishop and his chaplains, with the preacher and the minister who is to officiate, and the rest of the clergy, if any other be present, return to the west door, and go up the middle ile to the communion table, repeating the 24th psalm alternately, as they go up, the bishop one verse, and they another.

PSALM XXIV.

1. The earth is the lord's, and all that therein is: the compass of the world, and they that dwell therein.

2. For he hath founded it upon the seas: and prepared it upon the floods.

3. Who shall ascend into the hill of the lord, or who shall rise up in his holy place?

4. Even he that hath clean hands, and a pure heart: and that hath not lift up his mind unto vanity, nor sworn to deceive his neighbour.

5. He shall receive the blessing from the lord: and righteousness from the god of his salvation.

6. This is the generation of them that seek him: even of them that seek thy face, O Jacob.

7. Lift up your heads, O ye gates; and be ye lift up, ye everlasting doors: and the king of glory shall come in.

8. Who is the king of glory? it is the lord, strong and mighty, even the lord mighty in battle.

9. Lift up your heads, O ye gates; and be ye lift up, ye everlasting doors: and the king of glory shall come in.

10. Who is the king of glory? even the lord of hosts, he is the king of glory.

The bishop and his chaplains go within the rails; the bishop to the north side of the communion table, and the chaplains to the south side: The minister officiating goes to the reading desk, and the preacher to some convenient seat near the pulpit.

This not needful, if it be a new church built in an old parish.

The bishop, sitting in his chair, is to have the instrument or instruments of donation and endowment presented to him by the founder, or some proper substitute; which he lays upon the communion table, and then standing up, and turning to the congregation, says,

Dearly beloved in the lord; forasmuch as devout and holy men, as well under the law as under the gospel, moved either by the secret inspiration of the blessed spirit, or by the express command of god, or by their own reason and sense of the natural decency of things, have erected houses for the publick worship of god,

god, and separated them from all profane and common uses, in order to fill mens minds with greater reverence for his glorious majesty, and affect their hearts with more devotion and humility in his service; which pious works have been approved and graciously accepted by our heavenly father: Let us not doubt but he will also favourably approve our godly purpose, of setting apart this place in solemn manner, to the performance of the several offices of religious worship, and let us faithfully and devoutly beg his blessing on this our undertaking.

Then the bishop kneeling says the following prayer.

O eternal god, mighty in power, and of majesty incomprehensible, whom the heaven of heavens cannot contain, much less the walls of temples made with hands, and who yet hast been graciously pleased to promise thy especial presence in whatever place even two or three of thy faithful servants shall assemble in thy name, to offer up their praises and supplications unto thee; vouchsafe, O lord, to be present with us, who are here gathered together, with all humility and readiness of heart, to consecrate this place to the honour of thy great name; separating it from henceforth from all unhallowed, ordinary, and common uses, and dedicating it to thy service, for reading thy holy word, for celebrating thy holy sacraments, for offering to thy glorious majesty the sacrifices of prayer and thanksgiving, for blessing thy people in thy name, and for the performance of all other holy ordinances: Accept, O lord, this service at our hands, and bless it with such success, as may tend most to thy glory, and the furtherance of our happiness both temporal and spiritual, thro' Jesus Christ our blessed lord and saviour. *Amen.*

After this, let the bishop stand up, and turning his face toward the congregation, say:

Regard, O lord, the supplications of thy servants; and grant, that whosoever shall be dedicated to thee in this house by baptism, may be sanctified with the holy ghost, delivered from thy wrath and eternal death, and received as a living member of Christ's church, and may ever remain in the number of thy faithful and elect children. *Amen.*

Grant, O lord, that they who at this place shall in their own persons renew the promises and vows made by their sureties for them at their baptism, and thereupon shall be confirmed by the bishop, may receive such a measure of thy holy spirit, that they may be enabled faithfully to fulfil the same, and grow in grace unto their lives end. *Amen.*

Grant, O lord, that whosoever shall receive in this place the blessed sacrament of the body and blood of Christ, may come to that holy ordinance with faith, charity, and true repentance; and being filled with thy grace and heavenly benediction, may, to their great and endless comfort, obtain remission of their sins, and all other benefits of his passion. *Amen.*

Grant, O lord, that by thy holy word which shall be read and preached in this place, and by thy holy spirit, grafting it inwardly in the heart, the hearers thereof may both perceive and know what things they ought to do, and may have power and strength to fulfil the same. *Amen.*

Grant, O lord, that whosoever shall be joined together in this place in the holy estate of matrimony, may faithfully perform and keep the vow and covenant betwixt them made, and may remain in perfect love together unto their lives end. *Amen.*

Grant, we beseech thee, blessed lord, that whosoever shall draw near unto thee in this place, to give thee thanks for the benefits which they have received at thy hands, to set forth thy most worthy praise, to confess their sins unto thee, and to ask such things as are requisite and necessary, as well for the body as the soul; may do it with such steadfastness of faith, and such seriousness, affection, and devotion

votion of mind, that thou mayest accept their bounden duty and service, and vouchsafe to give whatever in thy infinite wisdom thou shalt see to be most expedient for them: All which we beg for Jesus Christ his sake, our blessed lord and saviour. *Amen.*

The bishop sitting in his chair.

Then the sentence of consecration is to be read by the chancellor, and signed by the bishop, and by him ordered to be registered, and then laid upon the communion table.

After this, the person appointed is to read the service for the day, except where it is otherwise directed.

Proper psalms, 84, 122, 132.

First lesson, 1 Kings 8. from v. 22. incl. to v. 62.

Second lesson, Hebr. 10. from v. 19. incl. to v. 26.

After the collect for the day, the minister who reads the service stops till the bishop hath said the following prayer:

O most blessed saviour, who by thy gracious presence at the feast of dedication, didst approve and honour such religious services, as this which we are now performing unto thee, be present at this time with us also by thy holy spirit; and because holiness becometh thine house for ever, sanctify us we pray thee, that we may be living temples, holy and acceptable unto thee; and so dwell in our hearts by faith, and possess our souls by thy grace, that nothing which defileth may enter into us; but that being cleansed from all carnal and corrupt affections, we may ever be devoutly given to serve thee in all good works, who art our saviour, lord, and god, blessed for evermore. *Amen.*

Then the minister proceeds in the service of the day, to the end of the general thanksgiving. After which, the bishop says the following prayer [if it be not one of the 50 new churches].

* Or, Servants.

† Throughout this prayer. for *him, his, he, hath; say, them, they, their, she, her, have,* as the occasion shall require.

Blessed be thy name, O lord, that it hath pleased thee to put it into the heart of thy * *servant N.* to erect this house to thy honour and worship. Bless, O lord, † *him, his* family, and substance, and accept the work of *his* hands; remember *him* concerning this; wipe not out this kindness that *he* hath shewed for the house of *his* god and the offices thereof; and grant that all, who shall enjoy the benefit of this pious work, may shew forth their thankfulness by making a right use of it, to the glory of thy blessed name, thro' Jesus Christ our lord. *Amen.*

[If the church that is to be consecrated, be one of the 50 new churches, which are ordered to be built by the late acts of parliament, the bishop says;

Blessed be thy name, O lord god, that it hath pleased thee by thy good spirit to dispose our gracious sovereign and the estates of this realm, to supply the spiritual wants of thy people, by appointing this and many other churches to be erected and endowed for thy worship and service; multiply thy blessings upon them, for their pious regard to thy honour, and to the good of souls; remember them concerning this, and wipe not out the kindness they have shewed to thy church, and to the offices thereof; and grant that our gracious king may see and long enjoy the fruits of his godly zeal, in the edification of the members of our church, and in the reduction of those, in the spirit of meekness, who dissent from it; that we may all live together in the unity of the spirit, and in the bond of peace, thro' Jesus Christ our lord. *Amen.]*

Then the minister who officiates, is to go on with the prayer of St Chrysostom, and the Grace of our lord Jesus Christ.

Then a psalm is to be sung, viz. 26. 6, 7, 8. with Gloria Patri.

Com-

Communion Service.

The bishop, standing on the north side of the communion table, as before, reads the communion service.

After the collect for the king, he says the following prayer.

O most glorious lord god, we acknowledge that we are not worthy to offer unto thee any thing belonging to us; yet we beseech thee, in thy great goodness, graciously to accept the dedication of this place to thy service, and to prosper this our undertaking: Receive the prayers and intercessions of us, and all others thy servants, who either now or hereafter entering into this house, shall call upon thee; and give both them and us grace to prepare our hearts to serve thee with reverence and godly fear: Affect us with an awful apprehension of thy divine majesty, and a deep sense of our own unworthiness; that so, approaching thy sanctuary with lowliness and devotion, and coming before thee with clean thoughts and pure hearts, with bodies undefiled, and minds sanctified, we may always perform a service acceptable to thee, thro' Jesus Christ our lord. *Amen.*

The two chaplains are to read, one the epistle, and the other the gospel.

The Epistle, 2 Cor. 6. 14 incl. to v. 17.

The Gospel, Joh. 2. v. 13. to v. 18. incl.

Then the bishop reads the Nicene creed. After which, a psalm is sung, viz. Ps. 100.

The Sermon.

The sermon being ended, and all who do not receive the holy communion returned, and the doors shut; the bishop proceeds in the communion service; and he and the clergy having made their oblations, the churchwardens collect the offerings of the rest of the congregation.

After the communion, and immediately before the final blessing, the bishop says the following prayer.

Blessed be thy name O lord god, for that it pleaseth thee to have thy habitation among the sons of men, and to dwell in the midst of the assembly of the saints upon earth; blest, we beseech thee, the religious performance of this day: And grant that in this place, now set apart to thy service, thy holy name may be worshipped in truth and purity to all generations, thro' Jesus Christ our lord. *Amen.*

The peace of god, which passeth all understanding, keep your hearts and minds in the knowledge and love of god, and of his son Jesus Christ our lord: And the blessing of god almighty, the father, the son, and the holy ghost, be amongst you, and remain with you always. *Amen.*

Confecration of a churchyard, together with the church.

When the service in the church is finished; the bishop, clergy, and people proceed to the churchyard. And the bishop, standing in the place prepared for the performance of the office there, the act or sentence of consecration is read by the chancellor, and signed by the bishop, and ordered to be registred.

After which, the bishop says the following prayer.

O god, who hast taught us in thy holy word, that there is a difference between the spirit of a beast that goeth downwards to the earth, and the spirit of a man which ascendeth up to god who gave it; and likewise by the example of thy holy servants, in all ages, hast taught us to assign peculiar places, where the bodies of thy saints may rest in peace, and be preserved from all indignities, whilst their

souls are safely kept in the hands of their faithful redeemer: Accept, we beseech thee, this charitable work of ours, in separating this portion of ground to that good purpose; and give us grace, that by the frequent instances of mortality which we behold, we may learn and seriously consider, how frail and uncertain our condition here on earth is, and so number our days, as to apply our hearts unto wisdom. That in the midst of life thinking upon death, and daily preparing our selves for the judgment that is to follow, we may have our part in the resurrection to eternal life, with him who died for our sins, and rose again for our justification, and now liveth and reigneth with thee and the holy ghost, one god world without end. *Amen.*

The grace of our lord Jesus Christ, and the love of god, and the fellowship of the holy ghost, be with us all evermore. *Amen.*

Consecration of a churchyard singly.

The ordinary service for the day is to be read at the church, except where it is otherwise ordered.

Psalms 39, 90.

First lesson, Gen. 23.

Second lesson, Joh. 5. v. 21. incl. to v. 30. or 1 Theff. 4. 13 to the end.

When the service at the church is over; the bishop, clergy, and parishioners repair to the ground which is to be consecrated: And the bishop, standing in the place prepared for the performance of the office, says:

The glorious majesty of the lord our god be upon us; prosper thou the work of our hands upon us, O prosper thou our handy work.

Then the instrument of donation is presented to the bishop.

Next, the act or sentence of consecration is read by the chancellor, and signed by the bishop, and ordered to be registred.

This done, the bishop reads the prayer that is before directed to be used in a churchyard which is consecrated together with the church.

Then are sung two staves of the 39th psalm, viz. v. 5, 6, 7, 8.

After which the bishop lets them depart with the blessing:

The peace of god which passeth all understanding, keep your hearts and minds in the knowledge and love of god, and of his son Jesus Christ our lord: and the blessing of god almighty, the father, the son, and the holy ghost, be amongst you, and remain with you always. Amen.

Vol. 1. p. 246. The statute, *Ne rector prosternat arbores in cœmeterio*, should be expressed to be 35 Ed. 1. ft. 2. (and not 13 Ed. 1. ft. 2.)

Deans and Chapters.

VOL. 1. p. 442. Notwithstanding what is there (and elsewhere) said, concerning deans of the new foundation coming in by the king's letters patent and institution from the bishop; yet in practice, at Norwich (it is said,) the dean doth not receive institution from the bishop, but is admitted by the chapter on a grant from the crown.

Vol. 1. p. 464. *dele* the paragraph concerning Mr *Salter*; which immediately follows the report of Sir *Robert Raymond* and Sir *Philip Yorke*: that gentleman, who is now master of the *Charterhouse* and prebendary of *Norwich*, having written to the author the following letter, on occasion of it.

“ *Norwich*: July 30, 1763.

“ Rev^d Sir;

“ I was surprized and sorry to read my name, in your book lately published: surprized; as I *knew*, there was no foundation for the story told of me: and sorry; as I *conceived*, it must appear to every attentive reader greatly to my discredit. I am *unable* to guess, *where* you could hear this account; and I am *unwilling* to guess, *who* could communicate to you with such circumstances, as a fact; that which had never any existence, even in my imagination. It is incompatible with the statutes of *Corpus-Christi* (or *Bennet*) college in *Cambridge*, to hold any ecclesiastical benefice *whatsoever* with a Fellowship: and it is incompatible with those of the cathedral church of *Glocester*, to come in Dean or Prebendary there; by any other method, than *Institution*; in virtue of a *presentation* to the bishop from the crown, given together with the Grant of the Deanery or Prebend; both under the Great Seal. Nor was any one step taken, or thought-of, by me or by any Friend of mine; to infringe either the one or the other. There was indeed a *person*; who, from *no* regard at all to *Me*, but a *very great* regard to *himself*, would have been glad to see the statutes of that Church set at naught, just at that time, and by the chaplain to the *Great Seal*, which I then was: and who therefore *efficiously* advised *Me* to have My instruments drawn in contempt of them: but, upon my speaking of this to my noble Friend and Patron, He acquainted me with the very particulars which you have recited; and with the Report, in which Sir ROBERT RAYMOND and Himself had joined, seventeen years before. After which information, had I been *never so much* interested in breaking through them, which I was not *in the least*; I neither *could* nor *would* have thought of it: nor could I have *obtained* such instruments from his Lordship, had I *wished* and *asked for* it never so ardently: nor lastly, had I obtained such, could I have been *admitted* by them at *Glocester*. And as I moved no question of the kind You hint-at, in 1737; so I have good reason to think, that *no other* has attempted to gain admittance into that cathedral, either Dean or Prebendary; since 1720, when that Report was drawn; in any other way, than what the Statutes expressly direct.

You do, very naturally and properly, at the head of Your Addenda, make an apology for Your *mistakes*; which You modestly suppose must be *many*, in so large a compilation: and desire to be inform'd by your readers, of such as occur to Them; promising to set them right in a separate publication. I accept this fair and honest invitation: and having affirmed this history to be untrue, in every particular; I intreat the favour of You, to insert this my *disavowal* of it, in the appendix You are preparing to Your very laborious work: Since, however justly *offended* at this misrepresentation, of which however I entirely acquit You; no one more

heartily wishes *success* to Your useful *labours*, and all increase of *honour* and *reputation* to Your *self*, than I do: to which no one thing can contribute more, or more effectually; than the noting and detecting of all errors, by whomsoever they may concern; as carefully and as freely, as *this* has been by Me.

I am, with very great and real esteem and regard,

Sir,

Your affectionate Brother, and
most obedient humble Servant,

SAMUEL SALTER."

Dissenters.

VOL. 1. p. 509. The case of Allen Evans, esquire, and the chamberlain of London, is brought (it is said) by way of appeal before the house of lords, and is not yet determined.

Heresy.

VOL. 1. p. 591. The statute *De hæretico comburendo*, expressed to be 2 H. 4. c. 5. should be 2 H. 4. c. 15.

Holidays.

VOL. 1. p. 608. Notwithstanding what is there said from Mr Johnson's own account of his case, concerning his omission of the service on the king's inauguration day, viz. that the prosecution against him did not proceed; it appears that it did proceed afterwards, and that he retracted his negative issue, and submitted: As is evident from the following extracts from archbishop Wake's *Collectanea*, now belonging to the library of *Christ-Church* in Oxford.

Mr Johnson, in the year 1715, was cited before the archdeacon of Canterbury, to give an account, why he omitted in his church the service of the king's inauguration.

Mr Johnson appeared, and gave for reasons those which he afterwards printed and published (and which he desired might be understood as well for his omission of the service of that day, as of other occasional prayers

prayers at other times) in his book, intituled, "The case of occasional
" days, and prayers; containing a defence for not solemnizing the ac-
" cession day, by reading the new form, and for not using occasional
" prayers."

This publication was in the year 1721: And in the conclusion of it
he says, "I heard no more of this matter."

In archbishop Wake's manuscripts at Christ-Church as abovementioned (Canterbury. V. 4. Art. 276.) is a letter from Dr Bower, archdeacon of Canterbury (who was then also bishop of Chichester) to archbishop Wake, proposing methods of bringing Mr Johnson's cause to a speedy issue; dated Oct. 26. 1723.

Then, Art. 277. follows a copy of Mr Johnson's proxy; viz.

"Whereas there has been a cause of office &c. And whereas divers articles have been given in and admitted, to which the said Johnson hath given a negative office — as by the act &c. — Now know all men by these presents, that I the said J. J. do acknowledge and confess my self sorry for having given offence in the matters contained in the said articles, and do hereby retract the negative issue given by me to them, and do confess the said articles in all and every part thereof, and submit my self in all things to the right reverend the archdeacon aforesaid, or his official; and do hereby sincerely promise not to offend in the like manner for the future: and being aged and infirm, and very unfit to travel from my said vicarage to Canterbury, but desirous that this my retraction of the negative issue given by me to the said articles, and my promise not to offend in the like manner for the future, may have their due effect; I do hereby constitute and appoint Mr George Upton, one of the proctors of the said archdeacon's court, to be my lawful and undoubted proctor, for me, and in my name, to appear before the right reverend the archdeacon aforesaid, or his official, or surrogate, or any other competent judge in this behalf, to pray and procure this my retraction of the negative issue given by me to the said articles to be admitted, and to confess the same in all their parts, with a promise in my name not to offend in the like manner for the future; and submitting in all things to what the right reverend the archdeacon or his official shall do touching the premises; ratifying, allowing, and hereby confirming, whatsoever my said proctor shall fully do or cause to be done herein. In witness whereof, I have hereunto set my hand and seal, this third day of March, 1723.

John Johnson.

Then follows,

6^{to} Martii 1723 Coram D^{no} Wise, &c.

Procurēs hinc inde consenserunt in diem &c. Tunc Upton ext^r procurium suum spiale sub manu et sigillo J. J. Clici partis suæ firmatum et vigore ejusdem retractavit responsa sua negativa aliis artis con^r eundem J. J. extis facta et data et animo contestandi litem affirmative et eodem agnovit omnes et singulos artos præd^r in omni parte eorundem esse veros

veros et nomine partis suæ submisit se Rdo Dno Epō Cicestr' Archiono Cant' ejusq' officiali cum promissione de non repetendo offensiones in articulis præd' objectas et homoi procurium retractionem, confession' submission' et promission' admisit Quatus &c. in præsentia Norris eadem confessâ oblata et acta per Upton acceptantis. Tunc dtus Upton petiit dtum J. J. partem suam dimitti dto Norris dissen' ad cujus petnem Dnus decrevit Monem contra dtum J. J. ad legend' et recitand' in Ecclia sua paroali de Cranbrook Formulas precum publicar' 29 Maii 1^o Augusti 5^{to} Novembris et 30 vel 31 Jan' legi et recitari autoritate Regia injunctas diebus respve præd' et ad certificand' Dno Archiono præd' ejusve officiali aut alii Judici in hac parte competent' de obedientia sua in hac parte facta primo die Juridico post 30^m Januarii prox futur' et condemnavit dtum J. J. in expensis &c. et assignavit Procuribus hinc inde ad audiend' Voltem &c. super petnem dti Upton et super taxation' earundem expensarum in prox^m &c. dto Upton dissen'.

Art. 292. Extract from a letter to archbishop Wake, in Mr Johnson's own hand-writing.

Cranbrook. Lady-day, 1724.

May it please Your Grace,

To accept of my most humble thanks for Your Lenity, in the point of extraordinary days and occasional prayers. And I promise that I will never give You just occasion to repent of it.—

A true Copy,

Edw^d Bentham.†

Leases.

VOL. I. p. 636, 637. The doubt and difficulty there set forth, concerning leases of tithes and other hereditaments incorporeal, is now remedied by an act of the 5 Geo. 3. as followeth:

Whereas it may be doubtful, whether by the laws now in being, archbishops or bishops, master and fellows, or any other head and members of colleges, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, or any other person or persons having any spiritual or ecclesiastical promotions, heretofore had, or now have, any power to make or grant any lease or leases of tithes or other incorporeal hereditaments only, which lie in grant, and not in livery, for one, two, or three lives, or for any term or terms of years, not exceeding 21, altho' the
ancient

† King's professor of divinity in the university of Oxford.

ancient rent is thereby reserved, and all other requisites prescribed by the acts of parliament now in being to that end, or any of them, were or are justly observed and performed, by reason that there is generally no place and effects wherein a distress can be had or taken; nor is there, in cases of leases for life or lives, any remedy in law for such persons, by action of debt, or otherwise, for recovering the rent due and in arrear, which is reserved on such leases for live or lives: Therefore, for obviating all doubts touching the same, and enabling the said persons to recover the rent reserved on leases for life or lives; it is enacted, that all leases as aforesaid made or granted of any tithes, tolls, or other incorporeal hereditaments solely, and without any lands, by any such persons as aforesaid, shall be good and effectual in law, against such persons, and their successors, as any lease made by such persons of lands or other corporeal hereditaments by virtue of the statute of the 32 H. 8. or any other act.

And actions of debt for rent in arrear may be brought against lessees for life or lives, their heirs, executors, administrators, or assigns, by the said persons as aforesaid, their executors, administrators, or successors; in like manner as any landlord or lessor or other person may do, for recovering arrears of rent due on any lease for life, lives, or years, by the laws now in being.

Marriage.

VOL. 2. p. 33. A doubt hath been made, in what manner a marriage celebrated by virtue of a special licence from the archbishop of Canterbury, shall be registred; especially where the marriage is solemnized in a private house, and by a clergyman not being the incumbent of the parish, and the incumbent refuses to permit the same to be entred in the parish register. But the doubt seemeth to be solved by the words of the act it self: The register book of marriages is of the goods of the parish, and consequently the churchwardens (and not the minister) ought to have the keeping thereof; and the act says, all marriages celebrated in any church or chapel, or *within any such parish or chapel*, shall be entered in such register; and therefore if the churchwardens shall refuse to produce the register book for that purpose, they may be compelled thereunto by legal process: for where a thing by any act of parliament is required to be done; that also is required, without which the thing it self cannot be.

Parish.

VOL. 2. p. 134. Concerning the boundaries of parishes, insert the following clause from the statute of the 2 & 3 Ed. 6. c. 13. f. 3. viz. *Every person who shall have any beasts or other cattle titheable, depa-*
sturing

sturing in any waste or common, whereof the parish is not certainly known, shall pay the tithe thereof where the owner of the cattle dwells.

Penance.

VOL. 2. p. 146. Where it is said, that the bishop of Chester cited his *commissary* to the archbishop's court; it should be, that he cited his *chancellor* (Mr Gastrell), to give an account of the commutation money received by him.

Wills.

VOL. 2. p. 541. Concerning the office and authority of a guardian, should be inserted these several clauses from the following statutes:

By the 7 An. c. 19. Infants seized or possessed of lands in trust, or by way of mortgage, shall and may, on direction of a court of equity, signified by an order made on hearing all parties, on petition of the person for whom such infant shall be seized in trust, or the mortgagor, or guardian of such infant, convey and assure the said lands, as such court shall direct.

By the 29 G. 2. c. 31. Guardians, on application to a court of equity, may obtain an order for infants to surrender leases, in order to accept new ones.

And by the 26 G. 2. c. 33. Guardians may consent to the marriage of such infants.

Vol. 2. p. 566. Concerning devises to children *in ventre sa mere*, the statute of the 10 & 11 W. c. 16. ought to have been inserted, which is as follows: — Where any estate shall, by any marriage or other settlement, be limited in remainder to, or to the use of the first or other son or sons of the body of any person lawfully begotten, with remainder over to the use of any other person; or in remainder to, or to the use of a daughter lawfully begotten, with remainder over to any other person; any son or daughter of such person lawfully begotten, that shall be born after the decease of his father, may by virtue of such settlement take such estate so limited, in the same manner as if born in the life time of their father; altho' there shall happen no estate to be limited to trustees, after the decease of the father, to preserve the contingent remainder to such after-born children until they shall come *in esse*.

Vol. 2. p. 615. Concerning the probate of wills; the practice, as there set forth, within the province of York, of swearing and examining one witness to the will, at the probate thereof, is in some of the dioceses discontinued; by reason of the inconvenience to the parties, and the utter inefficacy thereof in case of a contest: And the single oath of the executor is admitted for the proving of a will in common form; according as is the practice within the province of Canterbury.

Vol. 2. p. 629. The inconvenience recited from *Dyer*, that “where an administrator obtains judgment, and then dieth intestate, his administrator cannot have execution on that judgment,” is remedied by the statute of the 17 C. 2. c. 8. which enacteth, that *where any judgment after a verdict shall be had, by or in the name of an executor or administrator; in such case, an administrator de bonis non may sue forth a scire facias, and take execution upon such judgment.*

Vol. 2. p. 646. Estates *pur auter vie*, that is, estates held by lease during the life of another person, ought also to be put into the inventory; the same being made distributable by the statute of the 14 G. 2. c. 20.

Vol. 2. p. 700. In a case in chancery, Feb. 12, 1738. (Anonym.) it was said by lord Hardwicke, that the rule in that court is varied since the case in Vernon's reports (where it is said, that if the ecclesiastical court give sentence for the payment of a legacy without taking security to refund in case of deficiency of assets, a prohibition will lie);—for legatees are not obliged to give security to refund upon a deficiency of assets. *Tracy Atkins's Reports*. 491.

[But a court of equity, in case of such deficiency, will nevertheless compel such legatee to refund.]

A
T A B L E

Of the PROVINCIAL and LEGATINE constitutions: The first column expressing the names of the chapters; the roman numerals, and figures annexed, setting forth the volume and page of the Ecclesiastical Law; and the last column denoting the page in Lindwood or John de Athon respectively, Oxford edition, 1679.

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